Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IBRAHIM PARLAK,

PETITIONER,

v.

ERIC H. HOLDER, JR.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006), this Court affirmed that the "ordinary 'remand' rule," which governs courts of appeals' review of agency decisions, applies with full force to the courts' review of Board of Immigration Appeals ("BIA") decisions. In *Ventura*, and again in *Thomas*, this Court held that when a court of appeals finds error, absent rare circumstances it must remand to the agency for further consideration. Following *Ventura* and *Thomas*, however, the courts of appeals have fractured. Consistent with the Sixth Circuit's decision here, three other circuits have held that *Ventura* and *Thomas* require a remand only when further factfinding is necessary. Seven circuits, however, have held that a remand is required when the BIA applies the wrong legal standard, so that the agency may evaluate the evidence under the proper standard. The question presented in this case is:

Whether the "ordinary remand rule" required the court of appeals to remand this case to the BIA, once the court found that the agency had applied an incorrect legal standard in determining whether the "persecutor bar" of 8 U.S.C. § 1231(b)(3)(B)(i) precluded withholding of removal.

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OPINIONS BELOW

The Sixth Circuit's opinion is reported at 578 F.3d 457. App.1a-46a. The court's order denying rehearing and rehearing *en banc* is reported at 589 F.3d 818. App.47a-54a. The decisions of the Board of Immigration Appeals (App.55a-84a) and the immigration judge (App.85a-175a) are unreported.

JURISDICTION

The Sixth Circuit's judgment was entered on August 24, 2009. Petitioner's timely filed petition for rehearing or rehearing en banc was denied on November 24, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces the relevant statutory provisions.

INTRODUCTION

For over half a century, it has been an incontrovertible principle of administrative law that "the function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Once such an error is identified, a court of appeals must—absent rare circumstances—remand to the agency for further consideration. In two decisions, this Court made clear that this "ordinary 'remand' rule" applies with full force to the courts of appeals' review of decisions of the Board of Immigration Appeals ("BIA"). Accordingly, when the BIA errs, "[a] court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *INS v. Ventura*, 537 U.S. 12, 18 (2002) (per curiam) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744

(1985)); *accord Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam). "Rather, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744; citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))).

Following *Ventura* and *Gonzales*, however, the courts of appeals have split. A majority of the circuits—including the First, Second, Third, Seventh, Eighth, Ninth, and Tenth—have correctly understood this Court's decisions to hold that a court of appeals is required to remand for further proceedings where either additional factfinding is warranted or the BIA applied an incorrect legal standard. These courts rightly appreciate that it is the agency in the first instance that must apply the correct legal standard to the facts.

By contrast, consistent with the Sixth Circuit's decision here, the Fourth, Fifth, and Eleventh Circuits have held that the "ordinary remand rule" does not require remand where the BIA has not yet applied the correct legal standard. In those courts' view, a remand is only required where additional factfinding is necessary. When the error is a legal one, this minority of circuits holds that the courts themselves may apply the correct legal standard to the facts of the case in the first instance.

The Sixth Circuit held here that the BIA had applied a "vague and unhelpful" legal standard to determine whether the "persecutor bar" of 8 U.S.C. § 1231(b)(3)(B)(i) precluded withholding of petitioner's removal; but, after reviewing what it believed were the pertinent facts in the record, the majority went ahead

and applied the appropriate legal standard to those facts itself, resolving the case against petitioner without remanding to the BIA. The Sixth Circuit's decision conflicts with this Court's decisions in *Ventura* and *Thomas*, the decisions of seven circuits, and with the long held position of the Solicitor General. Its decision raises serious separation of power concerns by usurping for the judiciary a sensitive decision-making role delegated by Congress, and reserved by the Constitution, to the Executive Branch. This Court's review is necessary to bring much-needed consistency to the courts of appeals' treatment of BIA decisions that rest on incorrect legal standards and to ensure that sensitive judgments about immigration law and policy are made by the Executive Branch. At a minimum, this Court should summarily reverse the decision of the Sixth Circuit, as it has done on several other occasions where courts of appeals have made the same error.

STATEMENT OF THE CASE

Factual Background

1. Born a Kurd in Turkey, Ibrahim Parlak grew up being persecuted by a regime that systematically suppressed all expressions of Kurdish culture. In grade school, his teachers beat him for speaking Kurdish and forbade students from even learning the language. J.A.579-80.[1] During his teen years, he was beaten and tortured at the hands of the Turkish government for his participation in protests supporting Kurdish rights. J.A.581-91.

2. As a young adult in the mid-1980s, Parlak fled Turkey's oppression, moving to Germany as part of the

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[1] J.A. refers to the joint appendix in the Sixth Circuit.

Kurdish diaspora there. He organized Kurdish folk festivals for displaced Kurds, featuring Kurdish line-dancing and folk songs—activities which were suppressed in Turkey, J.A.602—as well as a shared sense of community. App.32a. Most of the festival revenues went toward entertainers' expenses. App.32a-33a. If any profits remained, they were sent to the Kurdish political action organization ERNK. *Id.* Parlak had no further involvement with the funds; though he surmised that "some of his fundraising efforts 'might' have found their way" from ERNK to the PKK, a Kurdish separatist group designated a terrorist organization by the United States Department of State in 1997 (more than a decade after Parlak's folk festivals), he had no way of knowing. App.32a-35a, 89a.

3. In 1987, Parlak decided to return to his hometown of Gaziantep, Turkey, to advocate Kurdish rights and reunite with his family. J.A.603-04. Because Turkey had revoked his passport on account of his Kurdish activism, Parlak believed he could only enter the country surreptitiously, and like many other displaced Kurds, he accepted help from the PKK in doing so. J.A.605-14. After six months at Helve camp, run by the PKK in Lebanon as a refugee and political organizing center in addition to serving military training functions, J.A.608-09, 775-76, Parlak and several others tried to cross into Turkey. App.3a. A firefight broke out when the group was spotted by Turkish *gendarma*, two of whom died. App.3a, 26a; J.A.276-84. There is no evidence Parlak shot at them or caused their deaths. App.28a. Two months later, the group crossed the border and walked to Gaziantep, where they hid from Turkish authorities. J.A.629-33.

They buried books, weapons, and clothes that they did not want to carry. J.A.295.

4. In October 1988, Turkish soldiers arrested and detained Parlak for 26 days until the now-defunct Turkish Security Court indicted him for the crime of Kurdish "separatism." App.26a; J.A.639-42. During his 26-day interrogation, Parlak was tortured by the Turkish *gendarma*, who blindfolded him, hung him by the arms, shocked him with electrodes, beat his genitalia, deprived him of sleep, food, water, and clothing, and anally raped him with a truncheon. App.26a.

5. In March 1990, following his torture-induced "confessions," he was convicted of "separatism" and released, having served 17 months. App.26a. The Security Court that indicted and convicted Parlak was no ordinary court. The European Union later forced Turkey, if it wished to join the Union, to close the Turkish Security Courts that convicted Parlak, due to their "deserved infamy as havens of torture and injustice." App.27a n.1, 36a n.5.

6. Parlak came to the United States in 1991 and promptly applied for asylum, which was granted the following year based on his "well-founded fear of persecution." App.26a. In his asylum application, Parlak made extensive disclosure of his arrest, conviction, and incarceration in Turkey, his presence at a 1988 border firefight with Turkish security forces, his time at Helve camp, and his involvement with ERNK. J.A.1190-97, 1210. His application also included a Turkish newspaper article reporting the death of two Turkish *gendarma*. J.A.1217. The article was mistranslated; Parlak spoke no English at the time. J.A.1216-17, 1239-41.

7. Parlak adjusted his status to lawful permanent resident in 1994 and in 1998 applied for naturalization, which the government denied in November 2001. App.26a-27a. These applications did not separately reflect the 1988 arrest in Turkey that had formed the basis of his successful asylum application. App.27a. In 2002, the INS initiated removal proceedings, charging Parlak with having made a willful misrepresentation of a material fact for not disclosing his 1988 arrest on the adjustment of status application (even though he had made full disclosure of that fact in his previously-filed asylum application) and with persecution of others. App.27a.

8. In July 2004, DHS submitted documents from a March 2004 *in absentia* proceeding of the recently-abolished Turkish Security Court, indicating that Parlak's term of incarceration for the crime of "separatism" was now *reduced* to 14 months, notwithstanding the fact that he had already served 17 months *nearly 15 years earlier*. App.5a, 36a-37a n.5; *Parlak v. Baker*, 374 F. Supp. 2d 551, 554 (E.D. Mich. 2005), *vacated as moot sub nom. Parlak v. U.S. Immigration & Customs Enforcement*, No. 05-2003, 2006 U.S. App. LEXIS 32285 (6th Cir. Apr. 27, 2006). "These documents were part of these courts' final, midnight actions, on the eve of their extinction. They were produced *in absentia*, a solid sixteen years after the events in question." App.36a-37a n.5 (citing U.S. Department of State, *2004 Country Report on Human Rights Practices: Turkey* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41713.htm).

On the basis that Parlak's 1990 "conviction" did not become "final" until 2004 when his term of incarceration was *reduced* in these midnight orders,

DHS took Parlak into custody on July 29, 2004, alleging that he had been "convicted" of a crime *after* entering the United States. App.125a-27a. In other words, DHS's position was that although Parlak had been convicted of separatism, served 17 months, and was released in 1990, his conviction did not become "final" until 2004 when it was modified—and thus, the conviction occurred "after" Parlak entered the United States. The immigration judge (IJ) deemed him ineligible for release on bond, and DHS filed aggravated felony charges, which were later dismissed by the BIA. *Parlak*, 374 F. Supp. 2d at 554-55; App.5a. On October 14, 2004, after a group of supporters from Parlak's southwestern Michigan community began to attract national media attention, DHS responded by filing three additional charges of removal against him. J.A.1257.

9. Parlak remained in custody for over 300 days, until June 3, 2005, when the district court granted his habeas writ, finding him a "model immigrant" who "is not a threat to anyone" and has "lived an exemplary life in the United States." *Parlak*, 374 F. Supp. 2d at 561. The district court also observed that DHS's behavior in this case "raises suspicion." *Id.* at 560.

10. Parlak has resided in the town of Harbert, Michigan since 1994, when he founded the restaurant, specializing in Kurdish cuisine, that he owns and operates to this day. As the district court found, Parlak "is both well-established and well-liked in the Harbert community and has substantial support among his neighbors." *Id.* at 554 n.5. Harbert is also where he raises his daughter, who was born there in 1997.

Procedural History

1. In December 2004, the IJ ruled that Parlak was removable on all counts, including the sole remaining charge on which he is now being held removable: "willful misrepresentation" for failing to disclose his 1988 arrest and "conviction" in his adjustment of status and naturalization applications, notwithstanding his extensive disclosure of these events in his earlier-filed asylum application. App.5a, 12a-13a. The IJ further ruled that Parlak was ineligible for withholding of removal as a persecutor of others. App.2a. The IJ's opinion copied and pasted entire sections from the government's pretrial briefs—citation errors included—and featured approximately 80 citations to the Turkish Security Court documents, all without addressing Parlak's unrebutted evidence that the substance of these documents resulted from torture. App.27a, 35a-36a & nn.4 & 5.

2. The BIA dismissed Parlak's timely appeal in November 2005. Recognizing the unseemliness of relying so heavily on evidence obtained by torture, the BIA purported to review the case "without resort to the Turkish conviction documents," and concluded that the remainder of the record supported "most" of the IJ's removability findings. App.14a, 50a, 64a. The BIA affirmed the IJ's willful misrepresentation finding relating to Parlak's adjustment of status application. The BIA also agreed with the IJ that Parlak was not entitled to withholding of removal because of the persecutor bar. The BIA reasoned that one "assists in persecution of others when he furthers the persecution in some way," and affirmed the IJ's finding that "through his work with the ERNK, he assisted in the persecution of others." App.21a, 69a. In particular, the

BIA cited the IJ's findings that Parlak had assisted in fundraising for ERNK through his organization of Kurdish folk festivals in Germany, which in turn supplied funds to the PKK, and that the weapons he buried after entering Turkey in 1988 were "for use by the PKK." App.13a.

3. Parlak timely filed a petition for review with the Sixth Circuit on November 23, 2005. On August 24, 2009, a divided panel denied the petition, upholding the BIA's willful misrepresentation and persecutor bar rulings.

The majority found that the persecutor bar standard that the BIA had articulated and applied was "vague and unhelpful." App.21a. The majority explained that, contrary to the less-demanding standard employed by the BIA, "the issue is not whether the person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with persecutors.'" App.21a (emphasis in original) (quoting *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005)).

The court also quoted this Court's footnote 34 in *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981), which spawned a long line of cases interpreting the persecutor bar.[2] App.18a-20a. While describing

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[2] The relevant portion of *Fedorenko* is a short footnote in which this Court commented that, while an individual who merely cut inmates' hair prior to execution "cannot be found to have assisted in the persecution of civilians," a paid guard who shot at escaping inmates "fits within the statutory language" of the persecutor bar of the Displaced Persons Act. 449 U.S. at 512 n.34. This Court observed that "[o]ther cases may present more

the BIA's analysis as "consistent with" *Fedorenko* in that the agency referenced an earlier BIA case that cited *Fedorenko*, the majority made clear that the persecutor bar analysis has developed substantially in the decades since *Fedorenko*. App.19a, 21a. As the majority explained, the Sixth Circuit, like other courts of appeals, merely "look[s] to *Fedorenko* for *guidance* in determining what constitutes 'assisting in persecution.'" App.19a, 20a (emphasis added) (citing *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 933 (9th Cir. 2006); *Zhang Jian Xie v. INS*, 434 F.3d 136, 144 (2d Cir. 2006); *Singh*, 417 F.3d at 739, 741). These courts of appeals, including the Sixth Circuit, have set out standards far more searching than the cursory framework of *Fedorenko*'s footnote 34. *See, e.g.*, *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009); *Miranda Alvarado*, 449 F.3d at 927-930; *Zhang Jian Xie*, 434 F.3d at 143-44; *Singh*, 417 F.3d at 739-41.

The correct standard, the majority makes clear, is that set out by the Sixth Circuit in *Diaz-Zanatta v. Holder*, which interprets the persecutor bar to include "'two distinct requirements'": "First, 'there must have been some nexus between the alien's actions and the persecution of others.' .... '[S]econd, if such a nexus is shown, the alien must have acted with scienter.'" App.21a-22a (quoting *Diaz-Zanatta*, 558 F.3d at 455).

Although the panel majority acknowledged that Parlak had "urge[d]" remand so that the BIA could apply the correct standard in the first instance, it nonetheless forged ahead to apply the *Diaz-Zanatta* test to the facts of this case in the first instance (without any acknowledgement of *Ventura* or *Thomas*).

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difficult line-drawing problems but we need decide only this case." *Id.*

App.22a. Identifying the facts that it deemed relevant, the majority concluded that a sufficient "nexus exists between Parlak's actions and the persecution of others and that Parlak acted knowingly."[3] *Id.*

The majority relied heavily on the Ninth Circuit's determination in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), that for purposes of evaluating a First Amendment challenge to a criminal statute, "[m]oney is fungible"; from this, the majority concluded that "Parlak voluntarily and knowingly provided money [to ERNK], which he knew could be used by the PKK for anything." App.22a. Neither the IJ nor the BIA had relied on that concept, let alone mentioned the Ninth Circuit case.

Judge Martin dissented. He explained that this Court "has repeatedly reinforced the need to remand cases like this one rather than engage in post hoc rationalizations of the Board's legal errors." App.29a-30a (citing *Negusie v. Holder*, 129 S. Ct. 1159 (2009)). In the dissent's view, the BIA's reliance on "a 'vague and unhelpful,' and therefore inadequate, standard" mandated remand. App.30a (quoting App.21a). By failing to do so, the dissent observed, the majority

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[3] After applying *Diaz-Zanatta*, the majority inexplicably remarked that "even if we were to find" *Diaz-Zanatta*'s test inapplicable to Parlak, "providing money and weapons to PKK fighters satisfies the plain meaning of the phrase ['assisting in persecution']." App.22a. As the dissent notes, however, the persecutor bar test set out in *Diaz-Zanatta* is "universally accepted" among the courts of appeals, App.34a, and the majority affirmed that its persecutor bar determination in this case "can be decided based on existing circuit precedent." App.20a (quotation marks and citation omitted). The majority's speculation about findings it could have made, had it found *Diaz-Zanatta* inapplicable, is thus inconsequential to the decision.

"swe[pt] away the Supreme Court's *diktat* that a remand ... is unnecessary only in 'rare circumstances.'" App.30a-31a (quoting *Negusie*, 129 S. Ct. at 1167 (quoting *Thomas*, 547 U.S. at 186)). "Parlak's case," the dissent noted, "is not so rare." App.31a.

The dissent explained that remand is particularly necessary in this case, because the agency—not the court—should decide in the first instance whether, under the proper standard, the knowledge and nexus requirements were met. App.29a. The dissent observed that it is far from clear that the persecutor bar would be triggered under the correct standard. In contrast to the BIA's less demanding standard, "the persecutor bar's knowledge requirement cannot be satisfied by a general finding that Parlak might have been aware that the PKK had, at some point, engaged in terrorist activity." App.31a. As to the "nexus" requirement, the dissent noted, "there is no evidence that the weapons he supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a. And "Parlak did not 'provide[] money' to the PKK." App.32a. Rather, he "helped organize musical festivals for Kurds in Germany"; "if profits remained after paying for the musicians and other entertainment, the remaining money was sent to the ERNK—Parlak had no other involvement." App.32a-33a.

4. Parlak timely filed a petition for rehearing or rehearing en banc, which was denied on November 24, 2009. In a dissent from the denial of rehearing, Judge Martin explained that the majority's decision "directly contradicts instructions from the Supreme Court," which "[i]n this situation ... instructs us to remand the

case so that it may be analyzed in the first instance under the correct law." App.52a, 53a.

REASONS FOR GRANTING THE WRIT

This case vividly demonstrates the importance of the ordinary remand rule and why courts of appeals are not authorized to make sensitive judgments reserved to agencies in the first instance. The Sixth Circuit's departure from decades of this Court's precedent further exacerbates an entrenched eleven-circuit conflict and warrants this Court's review in order to reconfirm bedrock principles of administrative law and separation of powers that a minority of the Nation's courts of appeals are now routinely flouting.

First, the Sixth Circuit's decision conflicts with over half a century of this Court's precedent defining the judiciary's limited role in reviewing agency decisions. This Court has long held that, once a reviewing court finds error, the rule—absent rare circumstances—is that the court must remand to the agency so that the agency can evaluate the facts in light of the correct legal standard. This Court confirmed in *Ventura* and *Thomas* that this rule applies with equal force in the immigration context. The Sixth Circuit disregarded this rule and usurped the BIA's authority when, after identifying error and no rare circumstances, it undertook its own analysis of the facts under the proper legal standard.

Second, the Sixth Circuit's decision deepens an already extensive circuit split. Seven circuits—the First, Second, Third, Seventh, Eighth, Ninth, and Tenth—have held that when the BIA applies the wrong legal standard, *Ventura* and *Thomas* require a reviewing court to remand to allow the BIA to re-evaluate the evidence under the proper standard.

Parlak's case would have been remanded to the BIA in these circuits. By contrast, consistent with the Sixth Circuit's decision here, the Eleventh Circuit and divided panels of the Fourth and Fifth Circuits have misunderstood *Ventura* and *Thomas* and have held that a remand is required only when further fact-finding by the agency is necessary. This conflict is mature and entrenched and warrants review.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND A MAJORITY OF THE COURTS OF APPEALS

A. The Sixth Circuit's Decision Conflicts With Over Half A Century Of This Court's Precedent

The Sixth Circuit's decision cannot be reconciled with six decades of this Court's jurisprudence governing the judiciary's review of agency decisions.

1. As this Court has repeatedly held, the role of courts of appeals reviewing agency action "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles." *Port of Portland v. United States*, 408 U.S. 811, 842 (1972) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) ("*Chenery I*")). This Court has made clear time and again that a court reviewing an administrative agency decision must judge the propriety of that decision solely on the grounds invoked by the agency: "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the

administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). Because an appellate court sits as a court of review, not as a decision-maker, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery I*, 318 U.S. at 88. "[T]he guiding principle" in such cases is that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

This principle has particular force in the immigration context. "Congress has exclusively entrusted" to the executive branch in the first instance the interpretation and application of the immigration law in asylum and removal cases. *Ventura*, 537 U.S. at 16 (quoting *Chenery I*, 318 U.S. at 88). And this Court has recognized that construing the scope of immigration laws is an "especially sensitive political function[] that implicate[s] questions of foreign relations," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)), which falls particularly within the province of the Executive Branch.

Accordingly, in *Ventura* and again in *Thomas*, this Court reemphasized more than half a century of firmly-rooted administrative law precedent: "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744)).

Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744)).

This Court has also made clear that the ordinary remand rule applies with equal force whether the agency's error is factual, legal, or both. In *Negusie v. Holder*, for example, this Court confirmed that the rule required remand to the agency "for its initial determination of the statutory *interpretation* question and its *application* to this case." 129 S. Ct. at 1168 (emphasis added). And in both *Ventura* and *Thomas*, this Court required remand so that the agency could "*evaluate the evidence*; ... *make an initial determination*; and, in doing so, ... through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Thomas*, 547 U.S. at 186-87 (emphasis added) (quoting *Ventura*, 537 U.S. at 17); *see also Rapanos v. United States*, 547 U.S. 715, 786-87 (2006) (Kennedy, J., concurring) ("[A] remand is again required to permit *application* of the appropriate *legal standard*." (emphasis added) (citing *Ventura*, 537 U.S. at 16)). This rule is grounded in common sense; as the dissent to denial of rehearing queried, "How can we tell if substantial evidence supports another adjudicator's legal conclusions if the adjudicator employed the wrong legal analysis?" App.52a.

The Sixth Circuit's decision here is flatly inconsistent with this precedent. The BIA determined that the persecutor bar rendered Parlak ineligible for withholding of removal if his actions furthered persecution "in *some* way." App.21a. The Sixth

Circuit correctly recognized that this standard was "vague and unhelpful," *ibid.*; indeed, the BIA's standard both attenuates the nexus required between the petitioner's actions and any persecution and, as the dissent observed, "in no way captures the 'knowledge' requirement." App.29a. But instead of remanding the case to the BIA to consider whether the facts met the correct and more demanding legal standard, the court undertook its own independent analysis.

There was no basis for the Sixth Circuit to pursue its own inquiry. As this Court explained in *Ventura* and *Thomas*, the courts of appeals lack the Executive Branch's experience and expertise in foreign policy. The Constitution charges the Executive Branch, not the courts, with conducting the Nation's foreign affairs. *See Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))).

The Sixth Circuit's inquiry should have concluded once it determined that the BIA applied the wrong legal standard. As in *Thomas*, the case plainly required considering the facts and "deciding whether the facts as found fall within a statutory term." 547 U.S. at 186. The majority did not so much as hint at the presence of any rare circumstances. Thus, once the BIA's "error of law [was] laid bare," the "function of the reviewing court end[ed]," and the matter should "once more go[] to the [agency] for reconsideration." *Idaho Power Co.*, 344 U.S. at 20.

2. The record in this case, moreover, starkly illustrates why "a judicial judgment cannot be made to

do service for an administrative judgment." *Chenery I*, 318 U.S. at 88. As the dissent explained, it was far from clear that the evidence satisfied the correct standard, or that the BIA would so conclude on remand. The correct standard requires "a causal connection with 'actual persecution' and knowledge or intent of such persecution." App.33a n.3.

The majority merely found that "the facts do *support* a conclusion of general assistance in persecution," App.21a (emphasis added)—not that the BIA *would* have arrived at the same result had it applied the correct standard in the first instance, let alone that the record *compels* such a result. "Even on an unsympathetic reading of the record," the dissent observed, Parlak "did not donate money directly to the PKK, and there is no evidence that the weapons he supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a. Further, the dissent noted, "there was no evidence that any of the acts that supposedly assisted persecution—here, the Kurdish festivals—were 'actually used [by the PKK] to persecute some individual or individuals.'" App.33a-34a (alterations in original) (quoting *Diaz-Zanatta*, 558 F.3d at 460).

Worse yet, to conclude that Parlak was subject to the persecutor bar, the majority invoked and relied heavily on the Ninth Circuit's decision in *Humanitarian Law Project*, 205 F.3d at 1136. That case addressed a First Amendment challenge to a federal criminal statute, and cannot in any sense be traced to the Nation's immigration policy, let alone the BIA, the Attorney General, or the Executive Branch. The majority invoked the Ninth Circuit's comment in *Humanitarian Law Project* that "[m]oney is fungible;

giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts." App.22a (citing *Humanitarian Law Project*, 205 F.3d at 1136). From this, the majority extrapolated that Parlak's knowledge that his fundraising efforts *could* possibly have found their way to the PKK was sufficient to invoke the persecutor bar.

But this is precisely the type of application of a legal standard to the evidence that should be left to the agency's discretion and expertise in the first instance. Parlak organized Kurdish dance festivals in Germany. Leftover profits, if any, were donated to ERNK, a Kurdish political action organization. Parlak had no further involvement with the funds; while he speculated that ERNK might have sent some funds to the PKK, a group designated a terrorist organization by the State Department *six years after Parlak's arrival in this country*, he had no way of knowing. The BIA should have the opportunity to determine whether this evidence meets the proper legal standard.

The Sixth Circuit's reliance on *Humanitarian Law Project* for purposes of the persecutor bar analysis has created a potentially far-reaching precedent with roots untethered to immigration policy.[4] Under the Sixth Circuit's decision, a petitioner who previously raised funds for an organization that may have dispersed funds to other organizations may be subject to the persecutor bar on account of a speculative, unverifiable path that those funds may have taken. For example, an immigrant who at some point donated money to a

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[4] The case is also not factually analogous. *Humanitarian Law Project* addressed donations made directly to designated terrorist organizations. 205 F.3d at 1135 n.1. Here, ERNK was never a designated terrorist organization.

humanitarian aid organization for purposes of disaster relief could be subjected to the persecutor bar if she knew, or reasonably should have known, that the aid organization might donate a portion of its monies to some other organization that may, in turn, be involved in terrorist activity.[5] Regardless of whether such a rule is prudent, it is indisputably a sensitive matter of domestic and foreign policy that falls squarely within the expertise of the Executive Branch.

As it stands, the BIA will have no opportunity to weigh in—either in the first instance or ever—on whether the principles wrenched from *Humanitarian Law Project* by the Sixth Circuit to extend the reach of the persecutor bar are consistent with the judgment and policy-making of the Executive Branch in this delicate area of immigration law. Whether the BIA itself could have chosen to rely on the reasoning of *Humanitarian Law Project* (however unlikely that prospect is) had the Sixth Circuit remanded the case, is beside the point.

As the Solicitor General argued in *Ventura*, "the rule requiring a remand after the reviewing court has ascertained *a legal error by the agency* is mandated by Congress's assignment of decision-making responsibility to the agency. ... Therefore, when the reviewing court decides the correct final result, the court 'usurp[s]' a congressionally delegated administrative function." Reply Brief for the Petitioner at 6-7, *INS v. Ventura*, 537 U.S. 12 (2002) (No. 02-29) (emphasis added) (quoting *Idaho Power*

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[5] *Cf.* Joseph Abrams, *UNICEF Partners with Islamic Charity Linked to Terror Groups*, FOXNews.com (June 19, 2008), http://www.foxnews.com/story/0,2933,366319,00.html.

Co., 344 U.S. at 20). Indeed, "[i]t is immaterial for purposes of the petition whether—if the case had been remanded—the BIA would have reached the same conclusion as the court of appeals. The significant point is that the court of appeals denied the BIA the opportunity to decide an important immigration issue that is assigned to it by statute and regulation ...."[6] *Id.* at 8.

As this Court has made clear, this principle applies with equal force "[f]or purposes of affirming no less than reversing" an agency decision. *Chenery I*, 318 U.S. at 88. Here, as in *Ventura*, a remand was required.

B. The Sixth Circuit's Decision Deepens An Existing Eleven Circuit Split

Despite the clarity of this Court's decisions in *Ventura* and *Thomas*, the courts of appeals are sharply divided over whether the ordinary remand rule applies where the BIA has not yet employed the correct legal standard to resolve an issue within the agency's field of expertise.[7] The Sixth Circuit concluded here that the

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[6] *See also Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 337 (2d Cir. 2007) (Calabresi, J., dissenting in part) ("Significantly, *Ventura* and *Thomas* are designed to prevent just such judicial preemption of BIA positions, *even when that preemption reaches what is arguably the correct result.*" (emphasis added)).

[7] There is widespread agreement among the courts of appeals that remand is not required where the BIA has applied an incorrect legal standard concerning a statute that the agency is *not* charged with administering, such as the Controlled Substances Act. *See, e.g., James v. Mukasey*, 522 F.3d 250, 256 (2d Cir. 2008); *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008). This petition is concerned solely with circumstances where the BIA erred with respect to a statute that the agency *is* charged with administering.

BIA applied a "vague and unhelpful" standard, but did not remand the case to the BIA to apply the correct legal standard to the facts in the first instance, and instead undertook its own independent analysis. This decision is consistent with decisions from the Fourth, Fifth, and Eleventh Circuits, but squarely conflicts with decisions from the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits. Those latter seven circuits have held that when the BIA applies the incorrect legal standard, a remand is required to give the BIA the opportunity to apply the correct standard to the facts in the first instance.

1. The Fourth, Fifth, and Eleventh Circuits have held that the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature. Those courts hold that a remand is necessary only when additional fact-finding is necessary.

In *Hussain v. Gonzales*, 477 F.3d 153, 156 (4th Cir. 2007), a divided panel of the Fourth Circuit found that the BIA had improperly failed to address the petitioner's motion to remand his case to the IJ. The majority declined to remand the case, however, because it interpreted this Court's decisions in *Ventura* and *Thomas* as concerning only "the appellate court's authority to review in the first instance *factual* issues not considered by the Board." *Id.* at 157 (emphasis in original). Instead of remanding to the BIA to review the motion on the merits in the first instance, the majority usurped that role and found that the petitioner would not have been able to make a sufficient legal case for the relief he sought. *Id.* at 157-58.

The dissent disagreed with the majority's narrow construction of *Ventura* and *Thomas*. *Id.* at 159-60 (Hamilton, J., dissenting). The dissent explained that "[t]he issues remanded in *Ventura* and *Thomas* both involved factual and legal aspects" which required "not only ... the Board's review of evidence in the record, but ... the Board's *application of the law to the facts*. Such *application of the law to the facts* brings into play the Board's conferred interpretative expertise in the field of immigration law." *Id.* at 160-61 (emphasis added) (citations omitted).

Similarly, in *Yu Zhao v. Gonzales*, 404 F.3d 295 (5th Cir. 2005), the court found that the BIA had erred when it "rubber-stamped" the IJ's adverse asylum determination and denied, under an unduly stringent legal standard, petitioner's motions to present new evidence of changed country conditions. *Id.* at 309-10. But over a dissent, the court declined to remand to the agency for further proceedings regarding changed country conditions, and instead *reversed* the BIA's ruling. *Id.* at 310-11. In declining to remand on that issue, the Fifth Circuit reasoned that, unlike in *Ventura*, the BIA had already rejected the petitioner's changed country conditions evidence, and therefore the court's ruling on the issue would not "usurp" the agency's authority to address the evidence in the first instance. *Id.*

And in *Calle v. United States Attorney General*, 504 F.3d 1324 (11th Cir. 2007), the Eleventh Circuit found that the BIA had failed to address the legal sufficiency of the petitioner's motion to reconsider the BIA's denial of her motion to reopen. *Id.* at 1329. Nevertheless, the court declined to remand, having determined that "[i]n this case, unlike *Ventura* and

Thomas, and like *Hussain*, the undecided issue is legal, not factual," and that it "fe[lt] comfortable deciding the issue left unresolved by the BIA in the first instance." *Id.* at 1330.

As in the Sixth Circuit's decision here, the line drawn between legal and factual issues by the Fourth, Fifth and Eleventh Circuits fails to recognize that an agency's application of the correct law to the facts is an important executive function that involves the formulation and administration of policy, as well as the exercise of expertise.

2. In direct conflict with those decisions, the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits have held that the rule of *Ventura* and *Thomas* governs where the BIA has applied an incorrect legal standard.

The First Circuit has held that "remanding to give the agency an opportunity to cure the error is the *ordinary* course" where "the agency decision is flawed by mistaken legal premises." *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007) (emphasis in original); *see also Rodriguez de Rivera v. Ashcroft*, 394 F.3d 37, 40 (1st Cir. 2005) (holding that because the agency action could not be sustained on the stated grounds, the appropriate remedy was to remand to the BIA for further proceedings consistent with the appropriate legal standard).

Similarly, the Third Circuit has held that where the BIA has "adopted an incorrect legal standard," the court must remand "to give the BIA the first opportunity to apply the correct standard." *Silva-Rengifo v. Attorney Gen. of the U.S.*, 473 F.3d 58, 70-71 (3d Cir. 2007) (citing *Ventura*, 537 U.S. 12). The Eighth Circuit has likewise held that "[w]hen the BIA applies

an incorrect legal standard, the proper remedy typically is to remand the case to the agency for further consideration in light of the correct standard." *Bushira v. Gonzales*, 442 F.3d 626, 633 (8th Cir. 2006) (quotation marks and citation omitted). And the Tenth Circuit has explained that a remand is required when the BIA applies the wrong legal standard, because it is the BIA that "should have the first opportunity to 'bring its expertise to bear upon the matter.'" *Mickeviciute v. INS*, 327 F.3d 1159, 1165 (10th Cir. 2003) (quoting *Ventura*, 537 U.S. at 17); *see also id.* ("[H]onoring an agency's authority is not measured by whether we reverse or affirm the agency's decision. Rather, we safeguard agency decision making by ensuring that the agency itself makes the decisions entrusted to its authority ....").

The Second, Seventh, and Ninth Circuits previously declined to apply the ordinary remand rule where the BIA had not yet applied the correct legal standard, but they have now adopted the majority approach. Despite criticisms from Judge Calabresi and then-Judge Sotomayor, the Second Circuit initially held that *Ventura* applies only where an issue "has not yet been considered by the BIA." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 313 n.15 (2d Cir. 2007) (en banc). Judge Calabresi found that position "dangerously in tension with *Ventura*'s command," *id.* at 336 (Calabresi, J., dissenting in part), and then-Judge Sotomayor criticized the court for "constricting the BIA's congressionally delegated powers," *id.* at 328 (Sotomayor, J., concurring). But after this Court's GVR of the Second Circuit's decision in *Hong Ying Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), in light of *Thomas*, *see Keisler v. Hong Ying Gao*, 552 U.S. 801

(2007) (per curiam), the Second Circuit changed course. It now holds that it "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt," nor itself "engage in fact-finding under the appropriate legal standard." *Matadin v. Mukasey*, 546 F.3d 85, 92 (2d Cir. 2008) (quotation marks and citation omitted).

Similarly, the Seventh Circuit used to hold that *Ventura* and *Thomas* required a remand only where further fact-finding was required. *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004). But it now holds that when the BIA employs an incorrect legal standard, "[t]he proper course of action" is not to decide the question in the first instance, "but to allow the BIA to re-evaluate the evidence under the proper standard." *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

The Ninth Circuit also changed course after *Ventura* and *Thomas*, and related GVRs of its decisions. *See Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (GVR where the Ninth Circuit had failed to apply the ordinary remand rule); *INS v. Silva-Jacinto*, 537 U.S. 1100 (2003) (same); *INS v. Yi Quan Chen*, 537 U.S. 1016 (2002) (same). Now, the Ninth Circuit clearly holds that, "where the BIA applies the wrong legal standard to an applicant's claim, the appropriate relief from this court is remand for reconsideration under the correct standard, not independent review of the evidence." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006).

Accordingly, it is clear that Parlak's case would have been remanded to the BIA by the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits. This eleven-circuit conflict is well developed, and there

is no reason to defer review. Further percolation in the courts of appeals will not lead to further clarity. Only this Court can clarify the scope of the ordinary remand rule and bring much-needed consistency to the courts of appeals' review of immigration decisions.

3. Certiorari review will also give this Court an opportunity to clarify that the "rare circumstances" exception to the ordinary remand rule was not intended to swallow the rule. The courts of appeals would benefit from the Court's guidance on this issue as well.

In *Calle*, for example, the Eleventh Circuit flatly declared that "rare circumstances" were present because "the undecided issue is legal, not factual," 504 F.3d at 1330—a situation that in this type of case is hardly rare. Similarly, in *Hussain* and *Yu Zhao*, the Fourth and Fifth Circuits both concluded that *Ventura*'s reference to "rare circumstances" makes the ordinary remand rule merely a "precatory" suggestion. *See Hussain*, 477 F.3d at 158 ("the language in *Ventura* is precatory, not mandatory"); *Yu Zhao*, 404 F.3d at 311 ("The Court could have worded its holding categorically, and its failure to do so must be a conscious decision."). As the *Hussain* dissent rightly pointed out, taking this approach under circumstances that are far from rare "creates an exception to the ordinary remand rule that swallows the rule." 477 F.3d at 161 (Hamilton, J., dissenting).

Other circuits—and the Solicitor General—have understood that the "rare circumstances" exception to the ordinary remand rule must not be permitted to make remand itself the exception. *See, e.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1067 (9th Cir. 2009) (finding that it was "obliged to remand to the BIA for an

appropriate decision based on all the relevant evidence" where the BIA had misunderstood the courts' disfavored group cases (citing *Ventura*, 537 U.S. at 16-17)); *Silva-Rengifo*, 473 F.3d at 70-71 (concluding that because the BIA had adopted an incorrect legal standard, the court "must remand to the BIA to give the BIA the first opportunity to apply the correct standard" (citing *Ventura*, 537 U.S. at 16)).

As the Solicitor General explained in its reply brief in *Ventura*, "[o]nly 'extraordinary circumstances' can justify judicial usurpation of an administrative agency's decision-making role." Reply Brief for the Petitioner at 3, *INS v. Ventura*, 537 U.S. 12 (2002) (No. 02-29). "[T]hat exception," the Solicitor General observed, "applies only in 'rare circumstances,' such as when the agency has manifestly demonstrated an unwillingness or inability to fulfill its congressionally assigned responsibilities, and there is *no other remedy available to the reviewing court.*" *Id.* at 2-3 (emphasis added) (quoting *Fla. Power & Light Co.*, 470 U.S. at 744). Accordingly, the courts of appeals should not be permitted to stretch the rare circumstances exception beyond what this Court intended by declining to remand merely because the issue to be remanded involves the application of law to fact. Indeed, such circumstances are far from rare.

The Sixth Circuit's failure to remand to the BIA could only be justified if this case presented rare circumstances, but plainly it does not. This Court's guidance is required to clarify for the courts of appeals that the "rare circumstances" exception does not render the ordinary remand rule a mere suggestion.

C. At A Minimum, Summary Reversal Is Warranted

In light of *Ventura* and *Thomas*, this Court should at a minimum summarily reverse the Sixth Circuit's decision. In *Thomas*, this Court explained that the court of appeals' "failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal." 547 U.S. at 185. This Court has also GVR'd a number of decisions, in light of either *Ventura* or *Thomas*, where courts of appeals have failed to apply the ordinary remand rule. *See Hong Ying Gao*, 552 U.S. 801 (citing *Thomas*); *Tchoukhrova*, 549 U.S. 801 (citing *Thomas*); *Silva-Jacinto*, 537 U.S. 1100 (citing *Ventura*); *Yi Quan Chen*, 537 U.S. 1016 (citing *Ventura*).

The Sixth Circuit, in failing to remand to the BIA, made the very same error here without even mentioning *Ventura* and *Thomas*, let alone distinguishing them. That error is "obvious in light of *Ventura*," and a summary reversal is likewise appropriate here to extinguish any doubt among the courts of appeals that remand is required where the BIA has not yet applied the correct legal standard.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0303p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IBRAHIM PARLAK *Petitioner-Appellant,* *v.* ERIC H. HOLDER, JR., Respondent-Appellee.	No. 05-4488

On Petition for Review from an Order of the
Board of Immigration Appeals.
No. A71 803 930.

Argued: October 22, 2007

Decided and Filed: August 24, 2009

Before: MARTIN, GIBBONS, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: David S. Foster, LATHAM & WATKINS, Chicago, Illinois, for Petitioner. Christopher C. Fuller, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:**

David S. Foster, John J. Marhoefer, LATHAM & WATKINS, Chicago, Illinois, for Petitioner. Douglas E. Ginsburg, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

GIBBONS, J., delivered the opinion of the court, in which SUTTON, J., joined. MARTIN, J. (pp. 19-33), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Petitioner Ibrahim Parlak seeks review of the Board of Immigration Appeals' ("BIA") decision affirming the decision of the immigration judge ("IJ") ordering Parlak's removal from the United States pursuant to various provisions of the Immigration and Naturalization Act ("INA"). Specifically, Parlak argues that the BIA erred by: (1) determining that Parlak was removable for fraud or willful misrepresentation pursuant to 8 U.S.C. § 1182(a)(6)(C)(i); (2) determining that Parlak was removable for engaging in terrorist activity pursuant to 8 U.S.C. § 1182(a)(3)(B)(i); (3) determining that Parlak's removal could not be withheld because he persecuted others and thus lacked refugee status under 8 U.S.C. § 1101(a)(42)(A), rendering him ineligible for withholding of removal pursuant to 8 U.S.C. § 1231(b)(3); (4) failing to address properly the IJ's reliance on allegedly torture-induced evidence; and (5) denying Parlak's application for a grant of deferral of removal under the Convention Against Torture ("CAT").

I.

Parlak, a native and citizen of Turkey, entered the United States in 1991. He applied for asylum, alleging that Turkish officials persecuted him because of his leading role in the Kurdish freedom movement. In his application he indicated that he was a "leading member of ERNK, which had close ties to the PKK." ERNK refers to the National Liberation Front of Kurdistan, and PKK is the Kurdistan Workers Party. A narrative statement included with the application related political involvement since 1975 (when Parlak would have been thirteen years old) and periods of police custody associated with his political activities during which Parlak was beaten and tortured. The narrative continued with the following statements. Parlak fled to Germany in 1980, where he continued his political activities. When he sought extension of his passport, Turkish officials refused, telling him he was wanted by the Turkish police and should return to Turkey. He therefore used a false passport. In 1987 he went to Syria and then to Lebanon to join the PKK. He remained in a PKK camp in Lebanon for eight months. He then returned to Syria and attempted an illegal return to Turkey. His effort to cross the border on May 21, 1988, with a dozen friends was unsuccessful; he and his friends were met with gunfire and shot back. On July 1, 1988, Parlak and seven friends successfully crossed the border from Syria into Turkey. They conducted political activities promoting Kurdish freedom. Turkish soldiers attacked on more than one occasion; various friends disappeared or were killed or injured. On October 29, 1988, Parlak was arrested and

tortured and given a death sentence.[1] His family paid a bribe for his release. In 1991 a policeman told him that his file would be reopened and "they will be looking for [him]." He left the country with a false passport. Based on this application, Parlak was granted asylum in the United States.

In 1994 Parlak successfully applied for an adjustment of status to lawful permanent resident, and in 1998 he applied for naturalization. He did not mention the 1988 arrest and conviction referred to in his asylum application in either the 1994 or 1998 applications and checked "no" in response to questions asking whether he had ever been arrested, charged, or convicted for breaking any law. Parlak's naturalization application was denied, apparently due to an outstanding 1995 Turkish arrest warrant and the fact that the PKK had been designated a terrorist organization in 1997.

Parlak was then charged with being removable at the time of his adjustment of status due to false statements made on his application for adjustment of status, specifically, the denial of an arrest, charge, or conviction and the denial of lending support to terrorist activities. Additional charges were later added, which included allegations of terrorist activity between 1985 and 1988. The terrorist activities alleged included organizing ERNK events that collected money for the PKK, receiving firearms training from the PKK in Lebanon, and actions associated with the 1988 efforts

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[1] This sentence was apparently soon reduced to four years and two months, a fact not included in the asylum application. An appeal by the prosecution followed, a fact also omitted from the asylum application. Later, in 2004, Parlak was apparently resentenced on this charge to six years.

to enter Turkey from Syria. Parlak was alleged to have exchanged gunfire in the May 21 incident, resulting in the death of two Turkish soldiers, and to have dropped a grenade on that same occasion. The charges referred to a March 2004 Turkish conviction at which the death of the two soldiers was imputed to Parlak. Parlak was also alleged to have transported firearms and explosives into Turkey about June 1, 1988.[2] The IJ conducted a hearing and ruled against Parlak on all charges. The BIA affirmed most of the IJ's rulings[3] but vacated the IJ's finding that Parlak is an alien convicted of an aggravated felony. Parlak petitioned for review of the BIA decision in this court.

II.

This court reviews only the decision of the BIA. *See Anssari-Gharachedaghy v. INS*, 246 F.3d 512, 513 (6th Cir. 2000). But "[w]here the BIA adopts the IJ's reasoning, the court reviews the IJ's decision directly to determine whether the decision of the BIA should be upheld on appeal." *Gilaj v. Gonzalez*, 408 F.3d 275, 282-83 (6th Cir. 2005).

We generally review the BIA's legal conclusions *de novo*, but we "defer to the BIA's reasonable interpretations of the INA." *See Patel v. Gonzalez*, 432 F.3d 685, 692 (6th Cir. 2005). We review factual findings under a substantial evidence standard "in which we uphold a BIA determination as long as it is

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[2] Other additional charges alleged commission of murder and a crime of violence after admission, referring to the 2004 conviction. This 2004 conviction was apparently a resentencing for the conviction obtained prior to Parlak's departure from Turkey and based on the May 21, 1988, incident.

[3] The BIA did not affirm the findings of commission of murder and a crime of violence after admission.

'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *Marku v. Ashcroft*, 380 F.3d 982, 986 (6th Cir. 2004) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). "[U]nless any reasonable adjudicator would be compelled to conclude to the contrary," the BIA's findings of fact are "conclusive." 8 U.S.C. § 1252 (b)(4)(B).

III.

We turn first to the BIA's ruling that Parlak was removable because he made material misrepresentations in his applications for adjustment of status and naturalization. Parlak argues that in finding him removable pursuant to 8 U.S.C. § 1182(a)(6)(C)(i), which makes any alien removable, "who, by fraud or willfully misrepresenting a material fact ... sought to procure ... a benefit under the [INA]," the BIA applied the incorrect legal standard. After the BIA's ruling, this court decided *Singh v. Gonzalez*, 451 F.3d 400 (6th Cir. 2006). Parlak argues that *Singh* requires the government to show "an intent to deceive" to establish fraud *or* willful misrepresentation of a material fact under 8 U.S.C. § 1182(a)(6)(C)(i). We review this issue of law *de novo*, while "defer[ring] to the BIA's reasonable interpretations of the INA." *See Patel*, 432 F.3d at 692.

A.

As an initial matter, the government contends that Parlak has waived this argument by not exhausting his administrative remedies pursuant to 8 U.S.C. § 1252(d)(1). Section 1252(d)(1) provides for appellate review of a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right ...." This exhaustion requirement is

designed to "ensure that the ... agency responsible for construing and applying the immigration laws ... has had a full opportunity to consider a petitioner's claims ...." *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004) (quoting *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2004)).

Singh was not decided until after the BIA had already considered Parlak's claims and issued its decision, so presumably the government contends that Parlak should have filed a motion to reconsider with the BIA. But "[s]uch motions, as a general rule, need not be filed to exhaust administrative remedies." *Perkovic v. INS*, 33 F.3d 615, 620 (6th Cir. 1994) (internal citation omitted). Therefore, we will address the merits of Parlak's argument that the BIA applied the wrong legal standard in finding Parlak removable pursuant to § 1182(a)(6)(C)(i).

B.

The BIA affirmed the IJ's finding that Parlak was removable pursuant to § 1182(a)(6)(C)(i) for his willful misrepresentation. The IJ interpreted § 1182(a)(6)(C)(i) as requiring that a willful misrepresentation be "deliberate and voluntary," but need not include an "intent to deceive." Parlak contends that *Singh* held that fraud *or* willful misrepresentation pursuant to § 1182(a)(6)(C)(i) requires a finding of an "intent to deceive." But *Singh* does not go so far.

Other courts of appeals and the BIA have consistently held that § 1182(a)(6)(C)(i) contains two alternative bases for removability: (1) fraud; or (2) willful misrepresentation of a material fact. *See Mwongera v. INS*, 187 F.3d 323, 330 (3rd Cir. 1999); *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997); *Matter*

of Kai Hing Hui, 15 I & N Dec. 288, 289-90 (BIA 1975). While fraud requires an intent to deceive, willful misrepresentation of a material fact does not. *See Mwongera*, 187 F.3d at 330; *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam*, 22 I & N Dec. 408, 424-25 (BIA 1998) (concurring and dissenting op.) ("Fraud requires that the respondent know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception," whereas for a "misrepresentation" "a specific intent to deceive is not necessary."). In *Mwongera*, upon which the IJ in this case relied, the Third Circuit confirmed this dichotomy while rejecting an argument similar to Parlak's:

> [W]e reject Mwongera's contention that the INS is required to show an intent to deceive in order to satisfy the statute. To the contrary, the INS must show that the alien obtained a visa by fraud (with its concomitant intent requirement) *or* by "willfully misrepresenting a material fact." INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i). "The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary." *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997). The INS does not need to show intent to deceive; rather, knowledge of the falsity of the representation will suffice. *See [i]d.*; *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977).

187 F.3d at 330 (emphasis in original). As the dissent concedes, this is also the current position of the BIA,

and indeed, has been since it decided *Matter of Kai Hing Hui* more than thirty years ago. *See* 15 I & N Dec. at 290 ("We interpret the Attorney General's decision in *Matter of S- and B-C-* [9 I & N Dec. 436 (AG 1961)] as one which modified *Matter of G–G–* [7 I & N Dec. 161,164 (BIA 1956)] so that the intent to deceive is no longer required before the wilful [sic] misrepresentation charge comes into play.").[4]

Singh does not suggest a contrary interpretation of "willful misrepresentation of a material fact." Instead, in *Singh*, this court addressed whether the BIA reasonably interpreted § 1182(a)(6)(C)(i) to "impute the *fraudulent* conduct of [an alien's] parents to [the alien child]." 451 F.3d at 403 (emphasis added). This court confirmed that the BIA has interpreted *fraud* pursuant to § 1182(a)(6)(C)(i) to require an intent to deceive. *See*

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[4] Parlak argues that treating "willful misrepresentation of a material fact" as a separate criterion for removal gives the fraud prong of § 1182(a)(6)(C)(i) no operative effect because there is never a need to prove an intent to deceive. But Parlak's reading itself renders "willful misrepresentation of a material fact" inoperative because he interprets it as identical to "fraud." We cannot say that a disjunctive reading of § 1182(a)(6)(C)(i)—the BIA's interpretation—is unreasonable given (1) that we generally "avoid an interpretation which would render words superfluous or redundant," *see Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001), (2) the use of the word "or," (3) that only a willful misrepresentation must additionally concern a "material fact," and (4) that Parlak advances no authority suggesting the phrase "fraud or willfully misrepresenting a material fact" should be read conjunctively. The dissent argues that we should look to the common law meanings of the words. However, with the statutory language as well as the relevant case law weighing heavily in favor of the BIA's interpretation, we find the agency's interpretation reasonable and see no reason not to afford it deference. *See Patel*, 432 F.3d at 692.

Singh, 451 F.3d at 406-07 (emphasis added) (citing *Matter of G-G-*, 7 I & N Dec. at 164). Given this interpretation, the BIA's determination that fraudulent conduct could be imputed to a child was unreasonable because the child would lack the requisite intent to deceive. *Id.* at 405-409 (finding the BIA's interpretation unreasonable under the second step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Because *Singh* dealt only with fraud, contrary to Parlak's suggestion, it did not create a new "intent to deceive" requirement for willful misrepresentations.

In the case at hand, because the IJ and BIA determined that Parlak had willfully misrepresented a material fact, a finding of an intent to deceive was unnecessary. After citing a number of cases indicating that a "willful misrepresentation" must be "deliberate and voluntary," but need not include an intent to deceive, the IJ specifically found that Parlak "made willful misrepresentations on his I-485 Application." The BIA affirmed these "findings as to ... removability...[of] an alien who has made a willful misrepresentation of a material fact." Thus, in determining that Parlak was removable pursuant to § 1182(a)(6)(C)(i) for willfully misrepresenting a material fact, the BIA was not required to find that Parlak had an intent to deceive.

C.

Substantial evidence also supports the BIA's application of the proper legal standard to the facts here. Willful misrepresentations must be: (1) deliberate and voluntary, which requires only "knowledge of the falsity," *Forbes*, 48 F.3d at 442; and (2) material, meaning the misrepresentations must

"have a natural tendency to influence the decisions of the [INS]," *id.* (quoting *Kungys v. United States*, 485 U.S. 759, 772 (1988)). Omissions of material facts can be material misrepresentations. *Matter of B-*, 7 I & N Dec. 465 (BIA 1957).

Parlak twice represented that he had no prior arrests or convictions; thus, he failed to disclose his arrest in Turkey in 1988 and his subsequent conviction. The BIA found that the questions on the application forms were unambiguous. Accordingly, Parlak's "no" answer provided the BIA with some evidence that Parlak's falsity was deliberate and voluntary. The BIA also relied upon the IJ's findings about the documentation Parlak submitted in connection with his asylum application. While Parlak did mention his arrest and sentence in the asylum application, he also submitted a falsely translated newspaper article. The translated version of the newspaper article offered by Parlak only stated that he was accused of being a PKK member and faced death by hanging; the true translation indicated that Parlak was on trial for killing two Turkish soldiers. Moreover, Parlak reported a death sentence in his asylum application but failed to mention that the sentence had been reduced and that an appeal from the prosecution was proceeding. The misrepresentations in the asylum application further support the conclusion that Parlak's subsequent falsity was also deliberate and voluntary.

These misrepresentations were also material. As the BIA explained:

> [T]he respondent's initial failure to mention the soldiers' deaths in the asylum application and his negative response to the question of whether he had ever been

> arrested in the other applications shut off a relevant line of inquiry into the respondent's role in the deaths of the two Turkish soldiers and, more broadly, the extent of his role in any armed resistance to the Turkish government. In each circumstance, the respondent's admissibility under 212(a)(3)(B) of the Act was at issue. In fact, the discovery of the full factual basis for the respondent's arrest ultimately caused the DHS to conclude that the respondent no longer remained a "refugee" under the Act.

Because these misrepresentations clearly had "a natural tendency to influence the decisions" of the DHS, *see Forbes*, 48 F.3d at 442, the BIA correctly concluded that the misrepresentations were material.

Overall, substantial evidence supports the BIA's determination that Parlak was removable pursuant to § 1182(a)(6)(C)(i) because he made willful misrepresentations of material fact.

We note that the BIA's discussion of material misrepresentation was limited to the failure to disclose the 1988 arrest and subsequent conviction. The IJ discussed other misrepresentations, including Parlak's nondisclosure of his affiliation with the ERNK, ARGK, or PPK and his denial of participation in terrorist activity. Because we review the BIA decision and because the evidence is sufficient to support its conclusion that Parlak was removable for willful misrepresentation about the 1998 arrest pursuant to 8 U.S.C. § 1182(a)(6)(C)(i), we need not discuss any other asserted misrepresentations. In addition, because we have found Parlak inadmissible based on his

misrepresentations about his 1998 arrest, we need not address the parties' lengthy arguments about whether he was also removable for terrorist activity.

IV.

The BIA found that Parlak was ineligible for withholding of removal because he assisted with PKK fundraising and transported weapons into Turkey for use by the PKK, thus assisting in the persecution of others. An individual who assists in the persecution of others is ineligible for withholding of removal. 8 U.S.C. § 1231(b)(3). Parlak challenges both the factual findings supporting this conclusion and the legal analysis underlying the conclusion that he assisted in persecution.

In discussing this issue, the BIA noted the IJ's finding that Parlak lacked credibility. At an earlier point in its opinion, the BIA had discussed the IJ's credibility determination, observing that the two most significant inconsistencies underlying it were the submission of the false translation in his asylum application and the denials of his 1988 arrest in his adjustment and naturalization applications. Also, earlier in its opinion, the BIA had discussed Parlak's objections to the IJ's reliance on Turkish conviction documents. While the Turkish conviction documents are far less central to the issues in the case than Parlak's brief suggests,[5] some discussion of them is necessary in order to place the factual findings on the persecution issue in context.

At the hearing before the IJ, the government relied on certain documents arising out of the Turkish

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[5] The Turkish conviction documents have no impact on the misrepresentation issue already discussed.

criminal proceedings against Parlak. Although the documents in part include factual information about the procedural history of the case, they also contain statements purportedly made by Parlak. Parlak contends that these statements were induced by torture he suffered at the hands of Turkish authorities. The IJ made no findings with respect to whether Parlak was tortured but did refer to the court documents, primarily to support its findings as to the procedural history of the case.[6]

The BIA noted the IJ's lack of findings as to torture and also noted Parlak's concession that the documents were reliable evidence of Parlak's conviction for separatism in 1990 and his resentencing in 2004. It rejected the argument that the IJ's rulings were reversible as unduly reliant on Parlak's statements in the documents and concluded that the record included sufficient evidence to support most of the IJ's findings as to removability and eligibility for certain forms of relief without resort to the documents. The BIA stated that it considered the Turkish conviction documents to be reliable evidence of Parlak's conviction and resentencing—the aspects of the documents that Parlak conceded to be reliable—for purposes of adjudicating the appeal but gave no indication that it otherwise considered the documents.

On appeal, Parlak devotes much attention to the BIA's handling of the documents issue, making a

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[6] The IJ also relied on these statements to support her finding that Parlak engaged in a terrorist activity. Because we affirm Parlak's removal on other grounds, we do not need to address the reliance of the IJ on these documents for her other findings.

number of complaints.[7] From our perspective, it does not seem problematic for the BIA to have considered Parlak's appeal without the contested portions of the statements. Essentially, the BIA ruled that it would give Parlak the benefit of the best outcome he could have hoped for before the IJ with respect to admission of the statements—their exclusion.[8] Even with the exclusion of the portions of the documents not conceded by Parlak, the BIA determined that there was still sufficient evidence to support the IJ's factual findings on the other issues that form the basis for affirmance.

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[7] For example, Parlak makes a creative effort to import American criminal procedure rules prohibiting use of compelled confessions and harmless error analysis into the immigration context. Given our handling of the documents issue, we see no need to comment further on these arguments. We do note, however, that, if we accepted Parlak's arguments, his testimony about the facts underlying his conviction would likely amount to waiver of his Fifth Amendment privilege and thus support admissibility of the documents for impeachment purposes, leaving to the trier of fact consideration of the circumstances of the statements in assessing them.

[8] If the IJ had explicitly ruled on whether the statements were induced by torture, there are several possible rulings. She might have determined that the claims of torture were untrue and considered the statements. She might have found that Parlak was tortured, but that other evidence corroborated the statements and thus made them sufficiently reliable for consideration. Or she might have excluded the statements as unreliable because induced by torture. In any event, consistent with the BIA's conclusion, any reliance by the IJ on the statements is so peripheral to her conclusions that it seems extremely unlikely that a specific ruling on torture would have affected the result before the IJ. Absent an explicit finding from the IJ, we will proceed, as did the BIA, under the assumption that the statements are unreliable.

The BIA determined that the record supported a finding that Parlak assisted in the persecution of others by providing funding for the PKK and transporting weapons into Turkey for use by the PKK. The record does contain such evidence, none of which is derived from the Turkish conviction documents.

The PKK targeted for violence Turks and Kurds who aligned themselves with the Turkish government rather than the PKK's aims of an independent Kurdish state. Before the IJ, both the government's expert and Parlak's expert testified that the ERNK raised money for the PKK. Parlak admitted in his testimony before the IJ that he raised funds for the ERNK and that he knew the ERNK provided money to the PKK. He also admitted knowledge of PKK attacks on village guards and that the PKK in general advocated "revolutionary terror."

Parlak also testified about the military nature of his training in the Lebanon camp. He admitted to the illegal entry into Turkey in 1988. He admitted both to bringing weapons into the country, including an AK-47 rifle, a pistol, and a grenade, and to burying arms, ammunition, and explosives. Additionally, he acknowledged leading Turkish authorities to the location of the hidden weapons. He disputes that these weapons were for use by the PKK and instead testified that they were for his own personal use.

Parlak strongly argues that the record does not support the BIA's determination that Parlak admitted that the buried weapons included rockets. Parlak's testimony about the rockets is in fact ambiguous. The government attorney primarily questioned him about rocket launchers, not rockets. At first Parlak appeared to concede that his group had buried rocket launchers,

along with arms, ammunition, and explosives, but at a later point he denied that rocket launchers were among the buried items. The final reference to rockets in the transcript appeared to elicit from Parlak a concession about the presence of rockets (not rocket launchers), but Parlak strongly argues that the reference is a transcription error and that the word should be "weapons" not "rockets." He brought the error to the attention of the BIA, but the BIA did not address the issue in its opinion.

Supplementing Parlak's testimony about weapons is the testimony of the government expert, FBI Special Agent Robert Miranda. Miranda analyzed Parlak's testimony about training at the PKK camp in Lebanon, his chosen method of entry into Turkey, the weapons he carried, and the burying of weapons. He concluded that the facts suggested that Parlak was moving into the military arm of the PKK and that his activities fit the profile of a PKK fighter. At one point Miranda mentioned rockets in passing, but his conclusions plainly did not depend on whether Parlak buried rockets.

The BIA considered the testimony of Parlak and Miranda. It also noted that the IJ's finding that Parlak buried the weapons for later use by PKK members was not clearly erroneous in view of the implausibility of Parlak's testimony that all of his weapons were for personal use. Having done so, it affirmed the IJ's findings.

Substantial evidence, as outlined above, supports the BIA's factual determinations. Parlak's strongest argument relates to the BIA's determination that the buried weapons included rockets, but this finding is not without support, at least as to rocket launchers, given

the ambiguity of Parlak's testimony. Although the BIA attached some significance to the inclusion of rockets, its ruling was not dependent on that fact alone. Notably, none of the evidence on which the BIA relied came from the Turkish conviction documents. Without considering Parlak's statements from the Turkish conviction documents, we affirm the BIA's factual findings.

Parlak also challenges the BIA's legal analysis, arguing that the BIA failed to distinguish between genuine assistance in persecution and inconsequential association with persecutors, as articulated in *Fedorenko v. United States*, 449 U.S. 490 (1981), in determining when an individual assists in persecution. The BIA simply articulated the test as whether an individual "furthers persecution in some way," citing a 1988 BIA decision.

In *Fedorenko*, the Supreme Court determined that a concentration camp guard who shot at escaping inmates based on orders had "assisted in the persecution of civilians." 449 U.S. at 512 n.34. In a footnote, the court provided:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the

> statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Id. As Parlak notes, courts have since looked to *Fedorenko* for guidance in determining what constitutes "assisting in persecution." *See, e.g.*, *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 933 (9th Cir. 2006) (translating prisoners' responses during torture interrogations qualified as "assistance in persecution" under *Fedorenko*); *Xie v. INS*, 434 F.3d 136, 144 (2d Cir. 2006) (transporting captive women to undergo forced abortions constituted "assistance in persecution" under *Fedorenko*); *Singh v. Gonzales*, 417 F.3d 736, 739, 741 (7th Cir. 2005) (distinguishing between "genuine assistance in persecution and inconsequential association with persecutors," and concluding that taking innocent individuals into custody to face police abuse constituted "assistance in persecution" under *Fedorenko*).

We first note that the Supreme Court recently held that we are not necessarily bound by *Fedorenko's* analysis because the INA has a different structure and purpose than the statute applied in *Fedorenko*, the Displaced Persons Act of 1948 ("DPA"). *Negusie v. Holder*, 129 S. Ct. 1159, 1165 (2009). Specifically, the Supreme Court found that although *Fedorenko* prevents consideration of whether an alien's assistance in persecution was voluntary for purposes of the DPA persecution bar, voluntariness is not necessarily irrelevant in determining whether an alien has assisted in persecution for purposes of the INA persecution bar. *Id.* at 1167. The Supreme Court remanded the matter

to be decided by the BIA in the first instance. *Id.* at 1168.

Negusie's holding, however, does not prevent all analogizing between *Fedorenko* and INA cases. Parlak, unlike Negusie, has not claimed that his actions were involuntary. Given that *Negusie* analyzed *Fedorenko's* application only in the context of allegedly involuntary actions, we find that *Fedorenko's* analysis of what constitutes persecution remains instructive where voluntariness is not at issue. Mindful of the differences between the DPA and the INA, we agree with the only circuits to have addressed this issue since *Negusie* and look to *Fedorenko* for guidance in defining what constitutes "assisting in persecution." *See Nguyen v. Holder*, No. 05-73353, 2009 WL 1956238, at *1 n. 1 (9th Cir. June 23, 2009) ("*Negusie* does not affect our reliance on *Fedorenko* to understand what kind of conduct constitutes persecution or assistance in persecution."); *Weng v. Holder*, 562 F.3d 510, 514 n.1 (2d Cir. 2009) ("Despite the[] differences between the statues, we find instructive-but do not consider ourselves bound by-*Fedorenko's* and its progeny's interpretations of the DPA's persecutor bar."). As with the facts before the Ninth Circuit, "[s]ince there is no question here that [Parlak] acted voluntarily, there is no reason to remand in light of *Negusie*, and the question of whether [Parlak] participated in persecution can be decided based on existing circuit precedent." *Nguyen*, 2009 WL 1956238, at *1 n.1.[9]

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[9] Not only is our approach consistent with every circuit court to have substantively addressed the issue, but it is also the approach urged by *both* Parlak and the government in letter briefs submitted to this court on this very question. (Pet. Letter Br. at 1) (arguing that *Negusie* "does not impact this appeal" and "is not

Indeed, in *Diaz-Zanatta v. Holder*, issued one day after *Negusie*, we announced our inclination to continue to apply *Fedorenko*: "We do not expect the Court's decision [in *Negusie*] to affect [petitioner's] case in a material way ... because []he has never argued that []he was compelled" to perform the acts in question. 558 F.3d 450, 460 n.5 (6th Cir. 2009).

First, we conclude that the BIA's analysis was consistent with *Fedorenko*. To be sure, the BIA's statement that "[a] person assists in persecution of others when he furthers the persecution in *some* way" was vague and unhelpful on its own. As *Fedorenko* line-drawing shows, the issue is not whether the person assists in *some* way; rather the analysis requires distinguishing between "genuine assistance in persecution and inconsequential association with persecutors." *Singh*, 417 F.3d at 739. But the BIA decision proceeded to compare Parlak's provision of weapons for PKK fighters with the coordination of arms shipments for the Provisional Irish Republican Army, which was found to qualify as "assisting in persecution" in *Matter of McMullen*, 19 I & N Dec. 90, 97 (BIA 1984) (citing *Fedorenko*, 449 U.S. 490). This type of analogizing is entirely consistent with *Fedorenko* and its progeny. *See Singh*, 417 F.3d at 739-40. Moreover, the facts do support a conclusion of general assistance in persecution.

In *Diaz-Zanatta*, we recently interpreted the *Fedorenko* analysis to include "two distinct requirements." 558 F.3d at 455. First, "there must have been some nexus between the alien's actions and

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inconsistent with application of *Fedorenko*") (Resp. Letter Br. at 1) (same).

the persecution of others." *Id.* "[S]econd, if such a nexus is shown, the alien must have acted with scienter." *Id.* Parlak urges us to remand in light of *Diaz-Zanatta*. However, Diaz-Zanatta's alleged persecution of others was more ambiguous than that before us and might not have been undertaken knowingly. In *Diaz-Zanatta*, the petitioner provided information to the Peruvian military as part of her job with the Peruvian military intelligence agency. *Id.* at 453. As soon as she became aware of the possible misuse of this information, she modified her actions, leaked information to the press about the persecution, and eventually fled to the United States. *Id.* at 453-54. By contrast, Parlak voluntarily and knowingly provided money, which he knew could be used by the PKK for anything, *see Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) ("[M]oney is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."), and weapons, which directly supported the PKK's persecution of others. Parlak's level of assistance is an order of magnitude greater than the harshest assessment one could possibly make about Diaz-Zanatta, and we find that a nexus exists between Parlak's actions and the persecution of others and that Parlak acted knowingly. *See Diaz-Zanatta*, 558 F.3d at 455.

Secondly, even if we were to find *Fedorenko*'s interpretation of "assisting in persecution," and consequently *Diaz-Zanatta*'s two-part test, inapplicable to Parlak, providing money and weapons to PKK fighters satisfies the plain meaning of the phrase. The Merriam-Webster Dictionary defines "assist" as "to give usually supplementary support or

aid to." *See* Merriam-Webster's Online Dictionary, http://www.merriam-webster.com /dictionary/assist (last visited May 19, 2009). The same dictionary defines "persecution" as "the act or practice of persecuting especially those who differ in origin, religion, or social outlook." *Id.* Black's Law Dictionary similarly defines "persecution" as "[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs." Black's Law Dictionary (8th ed. 2004). This case does not require that we trace the tricky contours of "assist" and "persecution" for all circumstances; we need only look to the plain meaning of the words to decide that smuggling weapons across an international border to aid the PKK in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution.

Because the BIA did not err in its legal analysis and because its determination that Parlak assisted in the persecution of others was supported by substantial evidence, we affirm its conclusion that Parlak was ineligible for withholding of removal.

V.

Finally, we conclude that the BIA did not err in rejecting Parlak's application for a deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.18. An applicant seeking relief under the CAT has the burden of proving that it is more likely than not that he will be tortured if removed to the proposed country. 8 C.F.R. § 208.16(c)(2); *Berri v. Gonzales*, 468 F.3d 390, 397-98 (6th Cir. 2006). Parlak claims that the BIA erred because in assessing whether Parlak met his burden, it did not explicitly

discuss Parlak's evidence that he had previously been tortured by Turkish officials.

"In deciding whether torture is more likely than not to occur upon the applicant's return to the country, we 'consider the possibility of future torture, including any evidence of past torture inflicted upon the applicant ....'" *Berri*, 468 F.3d at 397-98 (quoting *Ali v. Reno*, 237 F.3d 591, 596-97 (6th Cir. 2001)); *see also* 8 C.F.R. §208.16(c)(3)(i) (including "past torture inflicted upon the applicant" among "evidence relevant to the possibility of future torture [which] shall be considered"). While the BIA is required to *consider* "evidence" of past torture, neither *Berri* nor 8 C.F.R. § 208.16(c)(3)(i) require the BIA to make an explicit factual *finding* as to whether an applicant has previously been tortured. In addition, the BIA is also required to consider "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3)(iv).

Here, the BIA acknowledged that "there is some evidence that the respondent may face a possibility of mistreatment in Turkey." Because this evidence almost certainly included Parlak's assertions of past torture, the BIA's acknowledgment suggests that it properly "considered" the evidence of past torture. However, as required by 8 C.F.R. § 208.16(c)(3)(iv), the BIA also looked to other relevant evidence, including (1) the absence of evidence that Parlak is currently sought for any reason by the Turkish government and (2) reports that Turkey has taken significant steps toward eliminating torture. Weighing all the evidence, the BIA concluded that should Parlak return to Turkey, he would not be "more likely than not" to encounter torture. We conclude that the BIA considered the

appropriate evidence, and substantial evidence supports its determination that Parlak did not meet his burden under the CAT.

VI.

In summary, we deny Parlak's petition for review, concluding that the BIA correctly determined that he was removable for making willful misrepresentations in his adjustment and naturalization applications, that he was ineligible for withholding of removal because he assisted in the persecution of others, and that he has not met his burden for obtaining relief under the CAT. We need not reach the issues of whether Parlak was removable on other bases.

DISSENT

BOYCE F. MARTIN, JR., dissenting. This country offers its immigrants the chance for a new beginning, but retains the right to revoke the freedom it offers should it discover a past it dislikes, no matter how remote or ancient the offenses. I have no quarrel with that: for the nation's immigrants, past may always be prologue. I dissent, however, because this awesome power was used here to railroad a man out of our country.

The majority evidently approves of this mistreatment, and, in so doing, commits three significant errors. First, the standard used to conclude that Parlak made a "willful misrepresentation" was incorrect. Second, the majority effectively ignores recent Supreme Court and Circuit precedent when it finds that Parlak is ineligible for withholding of his removal. Third, the immigration judge improperly

relied on evidence likely induced through torture by Turkish Security Courts, and the Board and now the majority both claim the supernatural ability to block from the mind's eye this evidence, which the IJ cited roughly eighty times. This record is replete with error, and unless fixed, we will simply never know if Parlak's deportation is just. I would therefore remand this case to a different immigration judge for a fair adjudication–justice demands no less.

I.

Ibrahim Parlak, a Turkish native, was convicted of Kurdish separatism by the now defunct Turkish "Security Courts." His conviction stemmed from a 1988 incident in Turkey involving a gun fight between Kurdish separatists and Turkish soldiers where two Turkish soldiers were killed. Parlak was arrested. While there, officials tortured him to obtain admissions of involvement with the Kurdistan Workers Party, known as the PKK, along with admissions of specific terrorist acts. He stated that the Turkish *gendarma* shocked him with electrodes, beat his genitalia, hung him by the arms, blindfolded him while depriving him of sleep, food, water and clothing, and anally raped him with a truncheon. J.A. 874; 981-82. According to Parlak, after he refused to comply fully (despite this torture), the authorities brought in his seventy-year old father. J.A. 661-62.

After being interned for seventeen months, Parlak was released, though it is unclear whether that was because of a bribe or his cooperation. He left Turkey in 1991 and came to the U.S. where he was granted asylum based on his "well-founded fear of persecution." In his asylum application, he admitted supporting the PKK and he disclosed his 1988 arrest in Turkey. He

adjusted his status in 1994 to lawful permanent resident, and, since 1994, has resided in Harbert, Michigan, where he owns a restaurant and is where his daughter was born. In 1998 he applied for naturalization, which the government denied on November 28, 2001.

The government says that it denied his application because he did not disclose his 1988 Turkish arrest, though it admits that the arrest was the entire basis of his earlier asylum application and thus the reason he had been allowed to live in the U.S. This "fraud" charge became the basis for his removal proceedings, but it was soon joined with others, including accusations of his having aided terrorist organizations and having been convicted of murdering Turkish soldiers "after admission" to the U.S.[1] Pending the result of his deportation proceedings, immigration services threw Parlak in jail, where he remained until a district court ordered his release because he was neither a flight-risk nor a threat to his community.

At his removal hearing, the immigration judge, Elizabeth Hacker, ruled against Parlak on every point. She was apparently so convinced of his guilt that her opinion consisted largely of a cut-and-pasted agglomeration of the government's *pre-trial* briefs. Her opinion relied heavily on evidence obtained via torture by the Turkish Security Courts; she cited those documents roughly eighty times. On review, the Board of Immigration Appeals professed to affirm all of the IJ's factual findings and credibility determinations

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[1] The Turkish Security Courts that convicted him are were shut down due to their deserved infamy as havens of torture and injustice. *See* J.A. 974.

without regard to the Security Court documents, though it did not explain in detail how the IJ's conclusions could be supported without that evidence. The Board vacated the IJ's entirely meritless conclusion that Parlak murdered two Turkish soldiers, based wholly upon these same Turkish Security Court documents. But the Board repeated the IJ's other legal errors, many of which the majority repeats today.

II

A.

Assuming *arguendo* (and *dubitante*) that Parlak is removable, the majority nevertheless blunders by approving of an incorrect legal standard for finding an immigrant ineligible for withholding of removal. Its decision effectively guts controlling precedent of the Supreme Court, every other court of appeals to have addressed the issue, and this Court.

Some removable immigrants may avoid deportation because they qualify for "withholding." An immigrant is ineligible for withholding by the "persecutor bar," however, if he "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42)(B), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The Board did not apply this standard, however. Rather, it invented its own, and held that an immigrant is ineligible for withholding of removal whenever he "furthers persecution in some way."

This inadequate and overbroad statement lacks the well-defined and well-settled requirements that courts have delineated as necessary to satisfy the persecutor bar. Specifically, this Court requires the government to show: first, a "nexus between the alien's actions and

the persecution of others such that the alien can fairly be characterized as having actually assisted or otherwise participated in such persecution," and second, "if such a nexus is shown, the alien must have acted with scienter; the alien must have had some level of prior or contemporaneous knowledge that persecution was being conducted." *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (citing *Singh v. Gonzalez*, 417 F.3d 736, 739 (7th Cir. 2005), and *Castaneda-Castillo v. Gonzalez*, 488 F.3d 17, 20 (1st Cir. 2007)); *see also Balachova v. Mukasey*, 547 F.3d 374, 384 (2d Cir. 2008). Moreover, we explained in *Diaz-Zanatta* that, to find an alien ineligible for a withholding, the government must prove that "the alien ... had some level of prior or contemporaneous knowledge that the persecution was being conducted." 558 F.3d at 455 ("In the present case, the IJ's opinion did not *consider* ... whether Diaz-Zanatta had prior or contemporaneous knowledge of any such persecutions.") (emphasis added).

Instead of applying this precedent, the majority, though conceding (as it must) that the Board's "furthers persecution in some way standard" was utterly "vague and unhelpful," Maj. Op. at 15, inexplicably affirms anyway. That is wrong. Among its notable infirmities, this obviously inadequate "furthers the persecution in some way" standard in no way captures the "knowledge" requirement. So the proper result here would be to remand this case so the proper standard could be applied.

Indeed, the Supreme Court, by way of analogy, has repeatedly reinforced the need to remand cases like this one rather than engage in post hoc rationalizations of the Board's legal errors. In *Negusie v. Holder*, 129

S. Ct. 1159 (2009), for example, the Court ruled that the Board erred by refusing to consider the possibility that the Immigration and Nationality Act's persecutor bar *might* contain a "voluntariness" requirement—i.e., a "duress" exception. The Court ruled that the Board incorrectly assumed that *Federenko v. United States*, 449 U.S. 490 (1981), which construed the Displaced Persons Act of 1948, also completely controlled whether the Immigration and National Act contained a duress exception; the Board had determined that *Federenko* made clear that no such requirement existed and so there was no need to analyze the statute's text. Not so, said the Court: the Board's out-of-hand rejection of the "voluntariness" requirement was based on a "mistaken assumption stem[ing] from a failure to recognize the inapplicability of the principle of statutory construction invoked in *Fedorenko*, as well as a failure to appreciate the differences in statutory purpose." *Negusie*, 129 S. Ct. at 1167. The Court remanded so that the proper inquiry could be conducted.

As did the *Negusie* Court, we too should remand Parlak's case so the Board may clarify a "vague and unhelpful," Maj. Op. at 15, and therefore inadequate, standard. The *Negusie* Court concluded that, because "the BIA ha[d] not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Negusie*, 129 S. Ct. at 1167 (quotation marks omitted) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam), and *INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam)). Yet today's majority sweeps aside the Board and IJ's error, and thus it also

sweeps away the Supreme Court's *diktat* that a remand for such clarification is unnecessary only in "rare circumstances." *Negusie*, 129 S. Ct. at 1167 (quoting *Ventura*, 537 U.S. at 16-17). Parlak's case is not so rare, and while I agree that *Federenko*'s line-drawing footnote is instructive, *Federenko*, 449 U.S. at 512 n.34, it must be instructive for the Board in the first instance.

B.

Moreover, *Diaz-Zanatta* made clear that the persecutor bar's knowledge requirement cannot be satisfied by a general finding that Parlak might have been aware that the PKK had, at some point, engaged in terrorist activity. Indeed we held it insufficient "that Diaz-Zanatta knew that persecutions were taking place, if information Diaz-Zanatta collected and relayed to the military was not used in those persecutions." *Diaz-Zanatta*, 558 F.3d at 460. Similarly, the Seventh Circuit, in *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007), held that an alien had not "assisted" or "participated" in execution style murders of Jesuits in El Salvador despite having carried a rifle and donned camouflage while accompanying the thirty-to-forty other officers that murdered innocents. Doe fired no shots but, upon returning to the base, destroyed log books that would have identified the participating soldiers. Even on an unsympathetic reading of the record Parlak was far less involved than Doe: he did not donate money directly to the PKK, and there is no evidence that the weapons he supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone. Thus the persecutor bar should not apply

to Parlak, just as it did not apply to Doe or Diaz-Zanatta.[2]

The majority's only counter-argument is its assertion that "Parlak voluntarily and knowingly provided money, which he knew could be used by the PKK for anything," which is supported with no more than an out-of-context quote from *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), a case about a first amendment challenge to a ban on giving aid to organizations involved in terrorist activity. This view that money is different in all respects is overbroad. Specifically, Parlak did not "provide[] money" to the PKK; he helped organize musical festivals for Kurds in Germany. These featured line-dancing, folk songs, and a shared sense of community for displaced Kurds unwelcome in Turkey. Although Parlak testified that, if profits remained after paying for the musicians and other entertainment, the remaining money was sent to the ERNK—Parlak had

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[2] Incidentally, Parlak's dubious Security Court conviction for murder, which the IJ inexplicably treated with deference more appropriate for a legitimate domestic court judgment, was based on the Security Court's finding *not* that Parlak personally engaged in wrongdoing, but instead merely on his association with others who supposedly killed two Turkish soldiers. J.A. 1016 ("That although no evidence was found indicating that Defendants/Respondents Ibrahim PARLAK and Bektas YUKSELEN fired upon the military police during an armed confrontation that took place on 05/21/1988 while crossing into Turkey from Syria ... the presence of these Defendants/Respondents as armed militants of the outlawed PKK organization at the scene of the event gives strength to the argument of subjects being actual offenders in the crime and thus according to their acts, according to section 125 of the TCK, they shall be PUNISHED BY THE DEATH PENALTY."); *Cf. Doe*, 484 F.3d at 451.

no other involvement. And while it is true that money is fungible, to satisfy the persecutor bar's scienter or knowledge requirement Parlak would have had to not only know that he was giving money to the PKK itself (not proven in the record), but further that either the money he gave directly led to persecution or freed up other funds to be used for persecution—he still had to intend to assist in persecution. That money is fungible cannot absolve the government of its need to prove an intent to assist in persecution.[3] Furthermore, the record here comes nowhere near proving the particularized causal connection mandated by *Diaz-Zanatta*'s "link" or "nexus" requirement. Here, as with that case, there was no proven "actual connection between [petitioner's] actions and the persecution(s) in which [he] is alleged to have assisted or otherwise participated." 558 F.3d at 439 (citing *Singh*, 417 F.3d 740). And, as with that case, there was no evidence

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[3] The majority's quote from *Humanitarian Law Project*—"[M]oney is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts," 205 F.3d at 1136—while true, is irrelevant because it does not address scienter. Again, that is no surprise because *Humanitarian Law Project was* about a first amendment challenge to a blanket ban on providing aid to any group involved with terrorist activity; Congress had made a finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; AEDPA § 301(a)(7), 110 Stat. at 1247. That does not approach the persecutor bar's requirement that the government prove particularized facts regarding knowledge of or an intent to assist in persecution; and it is a far cry from requiring a causal connection with "actual persecution" and knowledge or intent of such persecution, as the persecutor bar does.

that any of the acts that supposedly assisted persecution—here, the Kurdish festivals—were "actually used [by the PKK] to persecute some individual or individuals." *Id.* at 460. Of course both the IJ and Board labored under the wrong standard; the majority strains to avoid a simple remand where the right questions could be asked and the answers could be properly ascertained.

Further, to buttress its de novo application of a standard that neither the IJ nor Board considered, the majority performs its own I-know-persecution-when-I-see-it review. Indeed, the majority does not really approve of the (universally accepted) legal hurdles *Diaz-Zanatta* requires, as it rather incredibly remarks that this standard could very well be "inapplicable to Parlak," which is nonsense because the case propounds the standard for *all persecutor bar cases*. This leads into its conclusory statement that "the plain meaning" of the persecutor bar means that "smuggling weapons across an international border to aid the PKK in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution." Let's unravel this. First, the evidentiary conclusion that Parlak "smuggled" weapons across the border is dubious—the idea that a handful of men carried a complete cache of weapons over mountains over the course of fourteen days is not supported by the evidence. In any event, there is no evidence in the record that Parlak did anything "to aid the PKK in committing violent acts." Apart from the Security Court documents, it will be recalled that the most Parlak admitted to was that at one time he was part of the ERNK, a group which he admits had ties to the PKK, and that some of his fundraising efforts "might"

have found their way to PKK coffers. Even assuming this was somehow sufficient, there was never a finding that the weapons he supposedly smuggled and buried—the actual basis for his supposed persecution of others—made it to the PKK and were used in "violent acts against Turks or Turkish-aligned Kurds," nor was there a showing that he had knowledge that they would be used in such a way. *See Diaz-Zanatta*, 558 F.3d at 460 ("It is not enough that information collected by Diaz-Zanatta and relayed by her to the SIE was used to persecute individuals if Diaz-Zanatta had no prior or contemporaneous knowledge of that; neither is it enough that Diaz-Zanatta knew that persecutions were taking place, if information Diaz-Zanatta collected and relayed to the military *was not used* in those persecutions.") (emphasis added).

Thus, without additional factfinding, the record is insufficient to sustain the majority's unique and self-directed analysis which manages the Janus-esque feat of applying a standard for the first time on appeal—and improperly so—while simultaneously casting doubt upon that same standard's continued validity. Accordingly, at a minimum, a remand is necessary.

III.

Apart from the majority's misapplication of the persecutor bar in contravention of established precedent, the factual basis underlying the IJ's and Board's conclusions was compiled by an immigration judge who repeatedly cited evidence induced by torture. Of course, the IJ made no finding about whether the evidence was the result of torture or not, a sin which the Board and majority treat as a virtue. Yet when has it ever been proper to *assume*, in the face of strong evidence and testimony to the contrary, that

such evidence is untainted? To its credit, even the Board knew it could not (at least publicly) rely on such evidence.

Then again, perhaps the IJ cannot be faulted for such heavy reliance: Most of her references to the torture evidence were apparently cut-and-pasted from the government's pre-trial briefs, so maybe she simply had not read the underlying documents. *See Ayi v. Gonzales*, 460 F.3d 876, 884 (7th Cir. 2006) ("Troubling to us is the surprising lack of regard for the rich record in this case coupled with the fact that at least parts of the IJ's opinion appear to be a 'cut and paste' job from previous opinions."). The IJ's opinion included the same errors as the government's briefs,[4] and this plagiarism makes the IJ's remark that she had presided over a "long and difficult hearing" ring hollow: what went on during the hearing was apparently of little relevance to her ultimate ruling.[5]

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[4] The most egregious example of this was the IJ's complete copying of the terrorism section of the government's pre-trial briefs. Anyone who has ever graded a paper can tell you that the repetition of errors is the surest sign of plagiarism: here, the IJ's opinion improperly cites the 2004 Security Court document (properly cited as Exhibit A), as "Trial Exhibit 2, Tab A," which was actually Parlak's asylum application. In each instance, the IJ's error duplicates the same error by the government. *Compare, e.g.*, IJ at 51, J.A. 75, "Propaganda" *with* Gov't Pre-Trial Br. at 27, J.A. 1076.

[5] Further, it is not clear why the immigration judge thought the documents from the Turkish Security Court deserved deference or were at all reliable. *See, e.g., Doe v*, 484 F.3d at 451 ("[I]t is not true in a case in which the proceeding that resulted in the conviction was demonstrably, and it is fair to say admittedly, a travesty—a parody—of justice."). The European Union forced Turkey to close these courts if it desired to join the union because of their history of torture and injustice. These documents were

Of course, when the Board writes its own opinion, this Court reviews that decision directly. But the Board's attempt to uphold the IJ's various conclusions without regard to the tainted evidence she used to reach them cannot stand. Immigration judges are responsible for compiling the record in immigration cases, and the Board's evidentiary reconstruction is beyond what courts can or should do. Accordingly, a remand is necessary to fix the record.

In rejecting Parlak's contention that the record supporting his deportation is tainted, the majority demeans his supposedly "creative effort to import American criminal procedure rules prohibiting use of compelled confessions and harmless error analysis into the immigration context." Maj. Op. at 10 n.7. The pot calls the kettle black. Though professing not to reach the question, the majority, citing no case, statute, or treaty, "creatively" muses on the theoretical significance of torture-induced evidence. One footnote asserts that if torture-induced evidence was admitted then Parlak nevertheless waived the right to exclude it, *id.*, and another provides a list of guesses on the

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part of these courts' final, midnight actions, on the eve of their extinction. They were produced *in absentia*, a solid sixteen years after the events in question. *See* U.S. DEPARTMENT OF STATE, 2004 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES IN TURKEY, *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41713.htm ("Legislative amendments abolished the State Security Courts .... [S]ecurity forces applied torture and ill-treatment widely .... The Constitution prohibits such practices; however, members of the security forces continued to torture, beat, and otherwise abuse persons regularly, particularly in the southeast. Security forces most commonly tortured leftists and Kurdish rights activists."). Why give deference or weight to *that*?

proper course of what a domestic court could do with torture evidence, *id.* at 11 n.8.

Although this Court has held that the U.N. Convention Against Torture is not self-executing, *Renkel v. United States*, 456 F.3d 640, 645 (6th Cir. 2006); *see also Medellin v. Texas*, 128 S. Ct. 1346, 1367 (2008), the United States is nevertheless a signatory and the treaty states that torture induced evidence "shall not be invoked in any proceedings, except against a person accused of torture...," 23 U.L.M. 1027, 1031 (1984). Further, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Reno v. Flores*, 507 U.S. 292, 306 (1993), and so due process and federal policy mandates that the government must shoulder the minimal burden of explaining *why* a court—federal, state, or immigration—ought to apply an exception to the general international rule of exclusion of torture-induced evidence. Instead, all we get is the majority's ill-considered dictum that somehow Parlak might be violating this Court's notion of fairness by requesting that he not be sent packing based on evidence obtained by torture.

IV.

The above assumes that Parlak is removable because he made a "willful misrepresentation" to the government, but I do not agree with the standard the IJ and Board used to find that he had, and therefore think that the case should be remanded on this point as well. The majority believes Parlak is removable under 8 U.S.C. 1182(a)(6)(C)(i), which makes an alien removable "who, by fraud or willfully misrepresenting a material fact ... sought to procure ... a benefit under

the [INA]."[6] The majority holds that while "fraud" would have required the government to prove that Parlak had a "specific intent to deceive," "willful misrepresentation," by contrast, would not, and requires only that the government prove by clear and convincing evidence that the allegedly false statement was "deliberate and voluntary." Maj. Op. at 7 (citing *Mwongera v. INS*, 187 F.3d 323, 330 (3rd Cir. 1999). This is incorrect.

Although Parlak primarily relies on *Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006) to assert that both statutory terms require the government to prove an "intent to deceive," I agree with the majority that

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[6] There is some irony to Parlak now being removed for only this charge. As the district court in his habeas proceeding observed:

> [T]he Court observes what appears to be a piling on of removability charges against Petitioner. He was initially charged with removability essentially for false statements regarding his conviction in Turkey; neither charge subjected him to mandatory detention and ICE did not see fit to detain him. Then, he was charged with being an aggravated felon. [The IJ found that he was such a felon but the BIA vacated this ruling.] Even assuming a 1990 conviction [*in absentia*] may even be the predicate for being an aggravated felon, his bond review proceedings before the immigration judge focused on whether there is a reason to believe he is removable based on engaging in terrorist activity. At the time, Petitioner had not yet been charged as removable for being a terrorist. After the immigration judge's decision, Petitioner was formally charged as removable for engaging in terrorist activity. The manner in which Petitioner's case has proceeded, or rather escalated, raises suspicion as to the actions of ICE under the circumstances. Once Petitioner was labeled a terrorist, the proceedings took on a decidedly more complex, if not high-profile, aura.

Parlak v. Baker, 374 F. Supp. 2d 551, 561-62 (E.D. Mich. 2005). After all this, the government ends where it started.

Singh does not control here. That case involved only "fraud" and did not discuss "willful misrepresentations." Yet, the majority, which outsources its reasoning to the Third Circuit's opinion in *Mwongera*, nevertheless creates an unwarranted distinction between these terms where none should be.

At first blush, the majority's simplistic reading is tempting: statutory terms should be interpreted so as not to render one of them superfluous, *see, e.g., United States v. Atlantic Research Corp.*, 551 U. S. 128, 137 (2007), and willful or intentional misrepresentation can, sort of, be interpreted as literally meaning only the "voluntary" and "deliberate" making of a false statement. But this view collapses under scrutiny.

First, the canon of interpreting statutory terms differently is no help here. Here, the satisfaction of either term leads to the same result (removability), and, under the majority's overbroad reading, "fraud" becomes a dead letter because it is reduced to a practical subset of "willful misrepresentation"—immigrants may be removed whenever a misrepresentation is voluntary and deliberate; there is no reason for the government to go further and prove "an intent to deceive."

Second, the majority's view is at odds with the common law meaning of these terms. They are undefined in the INA, and it is a "settled principle of statutory construction that, absent contrary indications, Congress intend[ed] to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994); *see also United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009). Traditionally, "willful" misrepresentations were not distinct from "fraudulent" ones. The categories of

misrepresentation were limited to "negligent misrepresentation," "innocent misrepresentation," and "fraudulent misrepresentation," for which "willful misrepresentation" is but a synonym. *See* RESTATEMENT (SECOND) OF TORTS, § 525-52C (1977); RESTATEMENT (SECOND) OF CONTRACTS, § 159-73. "Fraudulent misrepresentation," or more generally, "fraud," derives from the general heading of "deceit." At common law, deceit required the same basic elements as does fraud today:

> It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but *intending that the other should believe and act upon it,* if the person addressed believes it, and is thereby persuaded to act on his own harm.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW, IV. FRAUD, MALICE, AND INTENT – THE THEORY OF TORTS (1881) (emphasis added).[7]

Consistent with this common law understanding, "willful misrepresentation" first appeared as a synonym for "fraudulent misrepresentation," which had come into use to distinguish fraud and deceit from "negligent" or "innocent" falsehoods. And, until today, this Court has always treated willful and fraudulent

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[7] "The elements of deceit which throw the risk of his conduct upon a party are these. First, making a statement of facts purporting to be serious. Second, the known presence of another within hearing. *Third, known facts sufficient to warrant the expectation or suggest the probability that the other party will act on the statement* .... Fourth, the falsehood of the statement." *Id* (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS, § 525.

misrepresentation as one in the same, with both requiring a showing of "an intent to deceive." *See, e.g.*, *Trice v. Comm'l Union Assurance Co. Ltd.*, 334 F.2d 673, 676 (6th Cir. 1964) ("To constitute false swearing and willful misrepresentation ... it must appear undisputed that misstatements in the proof of loss were knowingly made with the intent to deceive or defraud the insurer."). In light of this common law history, had Congress wanted to create the subcategory that the majority recognizes today, it would have chosen some other term besides "willful misrepresentation."

So the better reading of the statute is that Congress used synonymous terms that encompass the same wrongdoing: fraud. Like the majority's, this reading suffers from the problem of reading two different terms alike. But it has the (rather essential) merit of comporting with the terms' traditional understanding and thus also Congressional intent. *See Shabani*, 513 U.S. at 13. It also reserves the drastic penalty of deportation for only fraudulent, intentional conduct.

This reading is no bolt out of the blue; it was the Board's long-standing view:

> Since the penalty is the same for actions accomplished by either fraud or willful misrepresentation, we believe the use of the word "fraud" and use of the term "willful misrepresentation" present two alternatives that are not substantially dissimilar. *Therefore, the phrase concerning willful misrepresentation should be read as requiring the misrepresentation to be of the same quality*

> *as does fraud.* This result can be readily reached if it is required that *the misrepresentation be made with knowledge of its falsity and with actual intent to deceive* so that an advantage under the immigration laws might be gained to which tne alien would not have otherwise been entitled ....
>
> Our belief that fraud and misrepresentation —the actions prohibited—both relate to substantially similar acts finds reinforcement in the severity of the penalty visited upon one who violates ... the act.

Matter of G-G, 7 I&N. Dec. 161, 164 (1956) (citations omitted and emphases added). It was this seminal interpretation that we recently cited in *Singh*.[8]

The IJ and Board thus erred in not requiring the government to prove by clear and convincing evidence that Parlak had an "intent to deceive" when it found he committed a "willful misrepresentation," and so we should remand so the proper standard may be applied. I need not wade into whether the Board's decision is

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[8] If there is any difference between "fraud" and "willful misrepresentation," it is the one the Board relied on for decades: The Board's view has been that the two differ in that, with willful misrepresentation, the government need not prove that it or anyone else in fact relied on false statements made with the intent to deceive. *Matter of G-G*, I&N. Dec. at 164 ("In this way, the misrepresentation would be differentiated from an act committed in fraud only in that proof would not be necessary that the person to whom the misrepresentation was made was motivated to action because of the misrepresentation."). That distinction is irrelevant here, however, as the Board made a more fundamental error in not requiring the government to prove that Parlak had an "intent to deceive."

supportable by substantial evidence (though the majority's strained efforts are unpersuasive). But I note that it seems implausible that Parlak had the requisite "intent to deceive" considering he had already disclosed his Turkish arrest in his request for asylum (which had been granted largely on that ground), and he was represented by counsel at the time of his naturalization application.

V.

The IJ, the Board, and now the majority have committed significant legal errors in adjudicating Parlak's removal proceedings. As a result, he will be deported without a fair determination of his legal status — three flawed opinions do not equal one correct one. Thus, there is something unreal about the majority's attempt to characterize its decision as the most straightforward of applications of immigration law when the foregoing proceedings have been anything but ordinary. There is nothing ordinary about the majority's blanket approval of an admittedly "vague and unhelpful" legal standard. And there is nothing ordinary (or proper) about a proceeding infected from the start by extensive reliance on evidence likely induced by torture, particularly where the IJ could not be bothered to do more than copy and paste swaths of the government's briefs. Those errors cannot be wished away by imaginative reconstruction—immigrants deserve better. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005) (Posner, J.); *Alexandrov v. Gonzales*, 442 F.3d 395, 404 (6th Cir. 2006); *N'Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring).

The only saving grace for Parlak has been that, contra to the government's wishes, he did not have to

sit in jail awaiting the result of these dodgy proceedings. *See Parlak*, 374 F. Supp. 2d at 561-62 (granting Parlak habeas corpus relief against indefinite detention). The district court's decision proved prescient, as, four years later, his case has been neither swift nor error-free, despite the government's assurances.

One can only hope that the majority is correct that conditions in Turkey have changed enough that a Kurd like Parlak, who will be ordered to leave his life in the United States behind him and to start anew, does not have to fear being beaten or slain upon his return.[9] And what has all this sound and fury been about? It all remains hazy. I agree though with Judge Cohn's best-guess as to why a supposedly straightforward immigration case became such a cause célèbre within the halls of those entrusted with removing him:

> Stepping back, the Court is left with the impression that the vigor with which [the authorities] ha[ve] given this case, and particularly the manner in which it is pursing Petitioner's detention, stems from the introduction of the moniker "terrorist."

Parlak, 374 F. Supp. 2d at 562 n.11. The majority thinks itself modest, but there is nothing modest about approving the clandestine and questionable proceedings that led here. This case should be remanded to a new immigration judge so that a proper

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[9] At the time of this opinion, bills are pending in both the House and the Senate that, if passed, would designate Ibrahim Parlak a lawful permanent resident of the United States. S. 403 111th Cong. (2009); H.R. 976, 111th Cong. (2009).

record could be compiled and the right standards applied to the relevant issues.

I remain hopeful, nevertheless, that this case is but a sad remnant of an era of paranoid, overzealous, error-riddled, and misguided anti-terrorism and immigration enforcement now gone by the wayside. It is just a shame that, even if my hope proves true, it is too late for Ibrahim Parlak.

I respectfully dissent.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit rule 206

File Name: 09a0425p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IBRAHIM PARLAK *Petitioner* *v.* ERIC H. HOLDER, JR., *Respondent.*	No. 05-4488

Filed: November 24, 2009*

Before: MARTIN, GIBBONS, and SUTTON, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

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* This order was originally issued as an "unpublished order" filed on November 24, 2009. It is now designated for full-text publication and incorporates Judge Martin's dissent.

active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Martin would grant rehearing for the reasons stated in his dissent.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting from denial of rehearing *en banc*. From 1994 until the government initiated deportation proceedings, Ibrahim Parlak operated a restaurant and raised his family in a small town in Michigan. There is no indication that he ever caused any problems here in the States. Why our government would elect to expend the time and money to rid our population of someone like Mr. Parlak is beyond me. As I acknowledged in my dissent to the panel opinion, however, "for the nation's immigrants, past may always be prologue," *Parlak v. Holder*, 578 F.3d 457, 471 (6th Cir. 2009) (Martin, J., dissenting), and, in any event, it is the government's prerogative to fritter away our resources as it sees fit. But one would assume that, if the government is going to expel a beneficial member of society for the alleged sins of his distant past, the government would go about its chosen folly correctly, in an above-board and dignified manner, and without over-reaching. One would further assume that those of us in the position of deciding Mr. Parlak's case, in the agency and in the judiciary, would demand this high standard of the government.

One would be wrong. In the hearing before the Immigration Judge, the government relied heavily

upon evidence that no one genuinely disagrees was obtained by torture twenty-one years ago in a Turkish prison.[1] Then, in a heartwarming display of adjudicative neutrality, the Immigration Judge issued an opinion that did little more than cut and paste from the government's briefs, typographical errors and torture-induced admissions included. Adding insult to injury, the Immigration Judge demonstrated either unprecedented gumption or an unfortunate insensitivity to irony in determining that Mr. Parlak lacked credibility based on his demeanor on the stand while at the same time giving credence to evidence obtained by torture—it is worth mentioning again—in a Turkish prison.[2] Given this rather inauspicious start to Mr. Parlak's journey through our immigration system, one would assume that things would be righted at the next stop.

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[1] Seriously, a Turkish prison.

[2] For a more detailed description of the two-ring (one for the Immigration Judge and one for the government) circus that occurred in the first round of removal proceedings, see Judge Cohn's excellent opinion in *Parlak v Baker*, 374 F. Supp. 2d 551 (E.D. Mich. 2005). In that case, Mr. Parlak sought habeas relief from his detention pending the completion of removal proceedings. Judge Cohn aptly describes the government's "piling on of removability charges" against Mr. Parlak. He further recounts how the Immigration Judge ordered that Mr. Parlak be detained on suspicions that he engaged in terrorist activity even though he had not been accused of engaging in any terrorist activity. I agree with Judge Cohn's observation that "once Petitioner was labeled a terrorist, the proceedings took on a decidedly more complex, if not high-profile, aura." *Id.* at 560. I take some solace in the fact that at least Judge Cohn did something right by Mr. Parlak when he ordered that Mr. Parlak be released during the pendency of his removal proceedings.

One would, again, be wrong. Having lost before the Immigration Judge, Mr. Parlak's next stop was the Board of Immigration Appeals. To its credit, the Board did not repeat the Immigration Judge's error with regard to the torture-induced evidence. Indeed, the Board's decision purports to disregard those portions of the Immigration Judge's opinion that rely on this evidence, though I have my doubts about the Board's ability to do this in practice. But, while it tried to repair the damage caused by the Immigration Judge, the Board caused even more harm on its way to affirming the judgment of the Immigration Judge.

A major issue before the Board was whether Mr. Parlak was eligible for withholding from removal—meaning that he could not be deported—or whether he was ineligible for withholding—meaning that he could be deported—due to the so-called "persecutor bar." The "persecutor bar" renders an immigrant deportable if, in the past, the immigrant "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42)(B), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). Both the plain language of the statute and settled precedent from the circuits recognize that operation of the "persecutor bar" requires a direct nexus between the immigrant's actions and the persecution of another as well as an intent to persecute or knowledge that persecution was occurring. *E.g. Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (citing *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005), and *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007)); *Balachova v. Mukasey*, 547 F.3d 374, 384 (2d Cir. 2008). However, instead of

employing this relatively uncomplicated inquiry to determine whether the evidence against Mr. Parlak triggered the "persecutor bar," the Board employed its own misguided inquiry to determine whether Mr. Parlak's actions of long ago "further[ed] persecution in some way." Finding that Mr. Parlak's actions did, indeed, further persecution in some way, the Board found that he was ineligible for withholding from removal. My colleagues on the panel describe this inquiry as "vague and unhelpful." *Parlak*, 578 F.3d at 469. I would describe it as grossly over-inclusive and as having sprung, unwanted and uncontrollable, from the collective mind of the Board like Athena from the head of Zeus, except without Athena's wisdom and elegance. But semantics aside, we all agree that the Board's inquiry was incorrect. One would assume that, in the face of a fundamentally flawed proceeding in front of the Immigration Judge and an incorrect analysis by the Board, the next body to examine this case would send Mr. Parlak's case back to start afresh.

One would, for a third time, be wrong. Mr. Parlak appealed the Board's decision to our Court. I believe that my colleagues on the panel recognized that the case came before us suffering from numerous procedural infirmities, and the majority's opinion shows that they tried mightily to inject some semblance of reason into the decisions of the Immigration Judge and the Board. Although I applaud their effort, I disagree with many of their legal conclusions. I set forth my disagreement in detail in my dissent to the panel opinion, *Parlak*, 578 F.3d at 471-81, so I do not reproduce it here.

But my larger question, and the first of two main reasons I believe this case should have been reheard *en*

banc, is why the majority felt compelled to undertake this effort at all. The Board indisputably used the wrong standard in analyzing Parlak's case. In this situation, the Supreme Court instructs us to remand the case so that it may be analyzed in the first instance under the correct law. *Negusie v. Holder*, __ U.S. __, 129 S. Ct. 1159, 1167 (2009). And, before this case, it was the settled practice of our Court to remand when the Board or Immigration Judge apply the incorrect law. *See, e.g., Callin v. Holder*, 333 F. App'x 926, 927 (6th Cir. 2009) ("Because we conclude that the BIA applied the wrong legal standard in reviewing Callin's claim that she did not receive the notice of removal proceedings, we reverse and remand to the BIA for review of this claim under the applicable statute, and to allow Callin's presentation of evidence."); *Tran v. Gonzales*, 447 F.3d 937, 944 (6th Cir. 2006).

Remanding in situations such as this serves two basic functions, one practical and one pedagogical. Practically, we remand because our question on review is whether "substantial evidence" supports the Immigration Judge's or the Board's legal conclusions as to deportation. How can we tell if substantial evidence supports another adjudicator's legal conclusions if the adjudicator employed the wrong legal analysis? Pedagogically, we remand to remind all involved that the proceedings in front of the Immigration Judge and the Board are not mere formalities on the way to an ultimate decision by the courts of appeals, but instead must be carried out in accordance with the law. Instead of remanding, however, the majority undertook what should have been the work of the Immigration Judge and the Board on remand by conducting a de facto *de novo* review of Mr. Parlak's

claims. This undertaking directly contradicts instructions from the Supreme Court, as well as the binding precedent and common practice of this Court. Thus, this case should have been reviewed *en banc*.

This leads into the second reason that I believe the *en banc* Court should have taken this case. As it stands, the majority's attempt to clear away the problems caused by the Immigration Judge and the Board is likely the final word on Mr. Parlak's removal. But the majority's opinion did not fix the problems; it compounded them. On behalf of our Court, the opinion offers a tip of the hat to the highly questionable result without so much as a wag of the finger[3] at the unquestionably flawed process, leaving me to wonder why we even maintain the pretense of procedure.

As I stated a few years ago, our recent immigration practice has effectively changed Emma Lazarus's beautiful words at the base of the Statue of Liberty from a solicitation seeking the tired, poor, huddled masses of the world into the exhortation "don't let the door hit you on the way out." *N'Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring). If this is what the law dictates, then we judges may not stand in the way. But our Court would have done well to convene to let it be known that, though we will not interfere with the deliberative execution of the immigration laws, we will not be accomplices in the government's unprincipled slamming of doors on those "tempest-tost" who, like Mr. Parlak, seek nothing more than to "breathe free." *Id.* (reproducing Lazarus's *The New Colossus*).

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[3] With a tip of the hat to M. Colbert of *The Colbert Report*.

I respectfully dissent from the denial of rehearing *en banc*.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A71-803-930 Date: NOV 22 2005

In re: IBRAHIM PARLAK

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John J. Marhoefer, Esquire

ON BEHALF OF DHS: Mark Jebson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C), I&N Act [8 U.S.C. § 1182(a)(6)(C)] - Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time

of entry or adjustment of status under section 209(b) but who is no longer a refugee under section 101(a)(42)(A) of the Act

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(A))

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(4)(B), I&N Act [8 U.S.C. § 1227(a)(4)(B)] - Terrorist activity

APPLICATION: Convention Against Torture

The respondent appeals from an Immigration Judge's December 29, 2004, decision. The Immigration Judge sustained various charges of inadmissibility against the respondent, and denied his application for protection under the Convention Against Torture. The respondent appealed. The appeal will be dismissed.

I. Overview

The respondent entered the United States on April 13, 1991, on a C-1 visa, as a nonimmigrant in transit (I.J. at 2). In 1992, he applied for asylum on the basis of his persecution at the hands of Turkish officials due to his membership and "leading" role in the National Liberation Front of Kurdistan (ERNK), which he described as having "close ties to" the Kurdistan Workers Party (PKK), a group that was designated as a terrorist organization by the United States

government in 1997. *See* Exh. 2, Tab A, Respondent's Form I-589, Application for Asylum; Exh. 2, Tab G.[1] His asylum application was granted in July 1992. In 1994, the respondent's status was adjusted to that of a lawful permanent resident. *See* Exh. 2, Tab C. In 1998, he filed an application for naturalization and was interviewed thereon in July 1999. *See* DHS Exh. KK. Apparently due to an outstanding 1995 Turkish arrest warrant against the respondent and the 1997 designation of the PKK as a terrorist organization, action on the respondent's naturalization application was delayed. *See* DHS Brief at 4. In September 2001, the respondent filed a complaint for Declaratory Judgment of Naturalization in U.S. District Court for the Western District of Michigan. His application for naturalization was denied on November 28, 2001. *See* Exh. 3 at 54-55. A Notice to Appear was then served on the respondent in April 2002, charging him with being inadmissible at the time of his adjustment of status under section 237(a)(1)(A) of the Immigration and Nationality Act. Exh. 1.

The bases for the charges in the Notice to Appear were the DHS's allegations that (1) the respondent lied on his adjustment of status and naturalization applications about the fact that he had been arrested in Turkey and (2) the respondent did not remain a refuge under the Act due to prior activities in Turkey that

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[1] The Department of Homeland Security (the "DHS," formerly, the Immigration and Naturalization Service (INS)) assumed the duties of the former INS in 2003. Exhibits submitted by the DHS will hereafter be designated as "DHS Exh. XX" whereas court exhibits will be referred to as "Exh. XX." Exhibits submitted by the respondent will be referenced as "Resp. Exh. XX."

rendered him a persecutor of others. *See* DHS Brief at 4. By extension, those core allegations form the basis for the charges that the respondent has misrepresented a material fact, is a persecutor of others, is an alien convicted of an aggravated felony (due to activities in Turkey), and is an alien who has engaged in terrorist activity. Before the Immigration Judge, the respondent filed an application for withholding of removal or deferral of removal under the Convention Against Torture, which was denied[2] (Tr. at 167; Exh. 6). On appeal, the respondent disputes the allegation that his failure to disclose his 1988 Turkey arrest was a "material" misrepresentation, noting that the fact of this arrest formed the basis for his 1992 asylum application. *See* Respondent's Brief at 72-74. The respondent also argues that his role in the ERNK was limited to supporting legitimate, nonviolent means of advocating for Kurdish rights, and that, therefore, he is not an alien who was a persecutor of others or who has engaged in terrorist activity. *Id.* at 52, 56, 82¬85. The respondent also disputes the allegation that his activities in Turkey, culminating in his separatism conviction, constitute an aggravated felony under the Act and, finally, argues that the evidence supports his application for relief under the Convention Against Torture.

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[2] Aliens who are found to have persecuted others or assisted in such persecution or those who are convicted of a particularly serious crime are ineligible for withholding of removal under the Convention Against Torture. *See* sections 241(b)(3)(B)(i), (ii) of the Act. Such aliens are nevertheless eligible for deferral of removal under the Convention Against Torture.

Because we find no clear error in the Immigration Judge's key factual determinations regarding the nature of the respondent's activities in Turkey before arriving in the United States, we will affirm the Immigration Judge's decision finding the respondent to be a persecutor of others and an alien who is removable for terrorist activity. We will also affirm the Immigration Judge's decision to sustain the charge that the respondent made material misrepresentations in his applications to the former INS. Finally, we will also affirm the Immigration Judge's determination that the record as a whole does not support a grant of relief under the Convention Against Torture.

II: Facts[3]

The respondent is a male native of Turkey who is of Kurdish ethnicity. Prior to entering the United States, the respondent was active in the organization ERNK, which he described as a "Kurdish liberation front" (Tr. at 72). The respondent indicated he was an "organizer" of the ERNK (Tr. at 72). The respondent stated that his participation in the group was triggered by repression of Kurdish culture and beliefs under the Turks (Tr. at 64). The respondent ultimately left Turkey to study in Europe and to speak on the topic of Kurdish liberation from 1980 to 1987 (Tr. at 72). While in Europe, the respondent was active in the ERNK, organizing celebrations of Kurdish culture and other meetings, handing out literature, conducting seminars, and visiting families in their homes (Tr. at 74). During

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[3] The facts set forth herein are as found by the Immigration Judge. The majority of the factual findings are not disputed by the respondent. We have noted in our discussion those findings that are disputed by the respondent. *See* Respondent's Brief at 7-14.

these celebrations or meetings, both the ERNK and PKK flag would be displayed (Tr. at 83). The respondent was active in organizing events aimed at raising funds for the ERNK (Tr. at 81-82). The respondent admitted that he personally solicited funds for the ERNK (Tr. at 125). He was aware that some of the money raised for the ERNK would go to the PKK, although he stated that he personally did not see such an exchange or know of the specifics of how it occurred (Tr, at 82-85). The respondent stated that he was aware that the PKK was fighting the "village guards," a group of civilians who were aligned with the Turkish government against the PKK (Tr. at 89-90; 92).

While in Germany, the respondent received word that his passport had been revoked by Turkey (Tr. at 537). Sometime thereafter, he decided to attend a camp in Lebanon run by the PKK (Tr. at 93). The respondent admitted that the training he received at the camp was "military" and "guerilla" training (Tr. at 94). While at the camp, the respondent was trained in using certain weapons and in cleaning them and re-assembling them (Tr. at 95). He initially stated that he received training in "shoulder rockets," but later denied this, saying that others at the camp received training in using rockets, although he stated that he personally was not trained on how to use one (Tr. at 95; 98-99). He received training in propaganda (Tr. at 147). The respondent stayed at the camp for 8 months (Tr. at 93) during which time he considered himself "associated with" the PKK (Tr. at 101). After about 8 months at the camp, he decided to re-enter Turkey surreptitiously because he wanted to go home and because he had no legitimate travel document with which to enter Turkey legally (Tr. at 101-03). The

respondent and several others who also attended the PKK camp formed a group that would enter Turkey through the Syrian border, with the help of a small group of Syrian guides who were also Kurds (Tr. at 101). Before leaving on this trip, the respondent met with Abdullah Ocalan who at that time was the leader of the PKK (Tr. at 188). The respondent actually met Ocalan at least twice before that (Tr. at 199).

Before attempting to cross into Turkey in May 1988, the respondent watched the border to determine the best place to cross without detection (Tr. at 206-07). When he actually set off to cross the border in May 1988, the respondent was accompanied by his five comrades from the PKK camp and the Syrian group (Tr. at 176; 181). The respondent was the leader of the group from the camp (Tr. at 186; 543). He was known by the code name of Ahanran (Tr. at 175). The respondent was armed with a pistol, an AK-47 automatic weapon, and a grenade (Tr. at 208-09; 217). The respondent testified that these weapons, including the grenade, were for self-defense (Tr. at 217-18). When they reached the border, someone in the larger group cut away the fence along the border and the respondent and his men crossed the border (Tr. at 214-15). At some point, they realized that the larger group (including the Syrians) had been detected by Turkish soldiers and that a gun battle between the Syrians and the Turks had ensued (Tr. at 215-16; 626-27). The respondent indicated in his asylum application that "when I was crossing the Turkish border with a dozen friends, we were shot at with automatic guns" and "we returned fire." Exh. 2 at Tab A. In testimony, the respondent indicates that he never fired his gun (Tr. at 216-17). In the melee, the respondent ordered his men

to turn around and return to Syria (Tr. at 220; 627). The respondent stated that on his way back into Syria, he saw the body of a Turkish soldier (Tr. at 216). He later stated, however, that he did not realize any Turkish soldiers were killed until the next day (Tr. at 627). On his way back into Syria, the respondent claimed that he accidentally dropped a grenade (Tr. at 217). The respondent claims that this grenade did not explode (Tr. at 558).

Several weeks after the gunfight, on or around June 1, 1988, the respondent and some of his men crossed into Turkey without incident (Tr. at 222). The respondent traveled to various villages to make connections (Tr. at 148) and began to bury extra weaponry and to construct underground shelters (Tr. at 178,228, 546). The respondent claimed that during this time, he went into villages and talked to people about aid, and promoted Kurdish culture and Kurdish rights (Tr. at 546-47). He was aligned with a group that sought to establish a Kurdish state (Tr. at 524-26). In October 1988, after he had been traveling in Turkey for several months, he was captured without incident by Turkish soldiers (Tr. at 264; 566). Upon being discovered by the soldiers, the respondent stated that the first thing he did was to grab his gun (Tr. at 264). Next, after he decided against fighting back, he attempted to burn his documents, including a journal and some photographs (Tr. at 265). The respondent was arrested and charged with advocating for the separation of Turkey (Separatism) in violation of Article 125 of the Turkish Penal Code. *See* DHS Exh. SS. He was convicted and served about 18 months. *See* Exh. 6 - respondent's application for relief under the Convention Against Torture. He was released in

1990 under unclear circumstances—i.e., some evidence in the record indicates that the respondent was released because of a lack of evidence, whereas other evidence indicates that the prosecutor took an appeal of the sentence. Exh. 2, Tab A; Tr. at 286-88; DHS Exh. B. The respondent claimed in his asylum application that his family bribed an official to obtain his release. *See* Exh. 2, Tab A. In testimony, the respondent stated that he was released because he essentially entered into a plea agreement wherein be agreed to show Turkish officials where weapons (including rockets) were buried in exchange for their ceasing his torture and harassment of his family (Tr. at 270-76). The plea agreement is referred to as a "code of confession" (Tr. at 282). The respondent claims that he was tortured until he confessed (Tr. at 579-95; 285). After his release, the respondent spent about a year in Turkey until he was able to secure a falsified passport and leave Turkey for the United States. *See* Exh. 2, Tab A.

After his entry into the United States in 1991. the respondent applied for asylum. His asylum application included some, but not all, of the details of the May 1988 gunfight between his group and the Turkish solders. For example, although the respondent disclosed that he was arrested by Turkey and charged with separatism, the respondent's account of the event neglected to mention that two Turkish soldiers died in the gun battle. Exh. 2, Tab A. The respondent also stated that he was sentenced to death by hanging, and gave no indication that this sentence had been reduced or that his case was on appeal. *Id.*

III. Immigration Judge's Reliance upon Turkish Conviction Documents

As an initial matter, we note that the respondent argues on appeal that the Immigration Judge erred by relying in any way upon facts contained in the record of the respondent's conviction for separatism in Turkey. *See* Respondent's Brief at 15-22 (referencing documents contained in the record at DHS Exh. SS). The respondent stated that his confession and statement were extracted by torture and that as such, the facts therein are unreliable. We note at the outset that the Immigration Judge did not make any findings of fact with regard to whether the Turkish conviction documents contain statements induced by torture. Accordingly, we view this issue as a question of fact over which we do not have *de novo* review. *See* 8 C.F.R. § 1003.1(d)(3). Nevertheless, we reject the argument that the Immigration Judge's findings of fact and law are reversible as unduly reliant upon the allegedly torture-induced confession in the conviction documents. That is because, as will be reflected below, the record contains enough evidence, even without resort to the Turkish conviction documents, to affirm most of the Immigration Judge's findings as to removability and, consequently, ineligibility for certain forms of relief. Moreover, the respondent admits that the documents are relevant and reliable evidence of the fact that the respondent was convicted of separatism in 1990 and was resentenced in 2004. Respondent's Brief at 21. We therefore will consider the documents to be reliable evidence of the same facts for purposes of adjudicating the appeal.

IV. Credibility

The Immigration Judge found that the respondent failed to provide credible testimony in support of his application for relief under the Convention Against Torture. In support of this determination, the Immigration Judge made certain demeanor-related observations and noted a "pattern of misrepresentations" that started when the respondent entered the United States on a fraudulent passport and continued through the submission of inaccurate and incomplete applications for asylum and adjustment of status (I.J. at 19-20). To begin with, the Immigration Judge found that in his initial asylum application, the respondent failed to disclose that the firefight in which he engaged in May 1988 resulted in the death of two Turkish soldiers (I.J. at 16). In connection with this, the Immigration Judge noted that the submission (with his asylum application) of an incomplete translation of the news paper article about the firelight reflected negatively on the respondent's credibility (*Id.*). Moreover, the Immigration Judge noted that the respondent failed to mention his prior Turkish arrest on (1) his adjustment of status application, (2) his naturalization application, and (3) an application for a liquor license (*Id.*). The Immigration Judge also indicated that she found the respondent's testimony that he had to sneak into Turkey through the Syrian border to be inconsistent with his other statements that he had traveled through Europe via a fake passport and that he feared returning to Turkey. *See* I.J. at 7; *see generally* Tr. at 618-19.

We note that the Board's review of the record is governed by the regulations set forth in 8 C.F.R. § 1003.1, which were amended on August 26, 2002, and

became effective on September 25, 2002. Under 8 C.F.R. § 1003.1(d)(3) the Board will not engage in de novo review of findings of fact determined by an Immigration Judge. Rather, the facts determined by the Immigration Judge, including findings as to the credibility of testimony, will be reviewed under the clearly erroneous standard. In light of the record as a whole, the Immigration Judge's finding that the respondent lacks credibility is not clearly erroneous. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485,495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence); see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (a finding is "clearly erroneous" when "reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

In this regard, we note the inadequacy of the respondent's explanations for two of the most significant inconsistencies underlying the adverse credibility determination. Specifically, with regard to the incomplete translation of the newspaper article, the respondent attempted to blame this on his translator or to claim that the omitted facts were not material, notwithstanding the fact that the respondent affirmed the content of the application and in any event bears responsibility for the completeness and accuracy of his submissions. *See* Respondent's Brief at 31. Moreover, with regard to the respondent's assertion that his denial of his 1988 arrest in his adjustment and naturalization applications was the result of a mere mistake, we note that this omission occurred three times. We find it implausible that a material omission

regarding something as serious as an arrest could be the result of a mistake three consecutive times. In sum, the respondent has failed to rebut the entirely reasonable conclusion of a lack of credibility drawn by the Immigration Judge from the aforementioned "pattern of misrepresentations," and we decline to find clear error in her adverse credibility determination in light of the record before us. Furthermore, to the extent that the adverse credibility determination is rooted in the Immigration Judge's observation of the respondent's "evasive" demeanor, it is entitled to a significant degree of deference, given the Immigration Judge's unique position to make such observations. *See Matter of A-H-*, 23 I&N Dec. 774, 787 (A.G. 2005).

V. Fraud or Willful Misrepresentation

We affirm the Immigration Judge's findings that the respondent is removable as an alien who by fraud or willful misrepresentation sought to procure a benefit under the Immigration and Nationality Act (I.J. at 18-22). *See* § 237(a)(1)(A) of the Act. The specific misrepresentations at issue are, of course, the respondent's failure to admit on his applications for adjustment of status and naturalization that he had been arrested in Turkey in 1988. Nondisclosure of material facts can be material misrepresentations to the same extent that affirmative statements are. *Matter of B-*, 7 I&N Dec. 465 (BIA 1957). The respondent argues that his failure to disclose this arrest on his adjustment and naturalization applications was harmless in that the United States government was already well aware of the arrest, given that it formed the basis for his 1992 asylum grant. Respondent's Brief at 72-73. We disagree. First, the Immigration Judge found, as a matter of fact,

that the respondent submitted a "fraudulent document," in support of his asylum application and made several misstatements on his asylum application as to: (1) the full nature of his role in the ERNK and assistance to the PKK, (2) the fact that he had been implicated in the deaths of two Turkish soldiers (although the respondent was never held personally responsible for the deaths), and (3) the final sentence for his conviction. I.J. at 16 (noting that a submitted translation of a newspaper article relating to the respondent's arrest was false); *see also* Exh. 2. Thus, the respondent's defense that the misrepresentation cannot be material because he already had disclosed the 1988 arrest must fail, in light of the demonstrated shortcomings in this earlier "disclosure." Second, the fact that the respondent disclosed this arrest in an earlier filing in connection with his asylum application does not change the fact that he later failed to advise the former INS of a material fact. *Compare* Exh. 2, Tab A *with* Exh. 2, Tab C and DHS Exh. K.K. Given the unambiguous questions on the applications (in which the respondent denied ever being arrested) and the fact that an arrest would be relevant to the respondent's eligibility to adjust his status or to be naturalized, the Immigration Judge properly found that the respondent engaged in fraud or willful misrepresentation in the above-referenced applications. *See Matter of S- & B-C-*, 9 I&N Dec. 436 (A.G. 1961).

A misrepresentation is "material" if either the alien is excludable on the true facts or the misrepresentation tends to shut off a line of inquiry that is relevant to an alien's eligibility for certain forms of relief or other immigration benefits. *See Matter of S- & B-C-*, *supra*,

at 447. As the Immigration Judge stated, the respondent's initial failure to mention the soldiers' deaths in the asylum application and his negative response to the question of whether he had ever been arrested in the other applications shut off a relevant line of inquiry into the respondent's role in the deaths of the two Turkish soldiers and, more broadly, the extent of his role in any armed resistance to the Turkish government.[4] In each circumstance, the respondent's admissibility under section 212(a)(3)(B) of the Act was at issue. In fact, the discovery of the full factual basis for the respondent's arrest ultimately caused the DHS to conclude that the respondent no longer remained a "refugee" under the Act. *See* Exh. 1, Notice to Appear. We therefore affirm the Immigration Judge's findings as to the respondent's removability under section 237(a)(1)(A) of the Act as an alien who has made a wilful misrepresentation of a material fact.

VI. Persecutor of Others

We affirm the Immigration Judge's findings with regard to her decision that the respondent is ineligible for the relief of withholding of removal because, through his work with the ERNK, he assisted in the persecution of others. *See* I.J. at 22-27; *see*

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[4] Our determination that the respondent assisted in the persecution of others, as explained in section VI, *infra*, demonstrates the materiality of his misrepresentation in relation to his acquisition of asylee status and permanent residence. Such assistance would have been a bar to his qualification as a "refugee" under section 101(a)(42) of the Act and would meet the tests for materiality set out in the opinion of either Justice Scalia or Justice Brennan in *Kungys v. United States*, 485 U.S. 759 (1988), assuming that the meaning of "materiality" in the denaturalization context is the same as in the context of the respondent's case.

§ 101(1)(42)(B) of the Act. A person assists in the persecution of others when he furthers the persecution in some way. *See Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988). The record reflects that the respondent furthered the persecution of those Turks who opposed a separate Kurdistan by providing funding for the PKK and also by transporting weapons into Turkey for use by the PKK. While we recognize that the respondent denies that he transported weaponry into Turkey *for the PKK*, we decline to credit this testimony in light of the adverse credibility determination in this case and in light of credible evidence in the record to the contrary. In fact, we note that the role of the respondent in the ERNK as found by the Immigration Judge is substantially more significant than what the respondent portrays on appeal. Specifically, the respondent himself admitted showing the Turkish authorities the location of stores of buried weapons, including rockets, after being arrested in 1988 (Tr. at 272-76). As the Immigration Judge noted in a finding that is not clearly erroneous, knowledge of the location of stores of weapons, and in particular, rockets, is inconsistent with the respondent's explanation that he carried only a small cache of weapons across the border for his own protection. The DHS expert witness, FBI Agent Robert Miranda, also testified that the activity described by the respondent (i.e., the knowledge of stores of weaponry) indicates he was a fighter for the armed wing of the PKK (Tr. at 413-14). But even if the respondent did not, as he claims, use the weapons against the Turkish forces, his provision of the weapons to PKK fighters qualifies as "assisting in" the persecution of others. *See Matter of A-H-*, *supra*, at 784 (noting that direct, personal involvement in act of

persecution is not required of someone who "incited, assisted in, or otherwise participated in" the persecution of others) (citations omitted). In *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), we relied upon evidence showing that the respondent had coordinated arms shipments to the Provisional Irish Republican Army ("PIRA") to find that the respondent in that case "provided...the instrumentalities with which the PIRA perpetrated its acts of persecution and violence." *Id.* at 96. In that case, we stated that we were "unwilling to isolate the arms shipments from their ultimate use by the PIRA." *Id.* at 97. As the Immigration Judge stated, the respondent's burying of weapons and ammunition for later use by PKK members[5] is "virtually identical" to the conduct of the alien involved in the *McMullen* case. *See* I.J. at 24.

Further, we also note that both the government expert, Agent Miranda, and the respondent's expert, Professor Gunther, testified that funds raised by the ERNK went to the PKK. *See* Tr. at 411 (Miranda: one of the "main functions" of the ERNK was to raise money for the PKK); 693 (Gunther: some of the goals of the ERNK were "raising money that could be used to finance violence or terrorism"). The respondent admitted knowing that at least part of the money he raised would go to support the PKK (Tr. at 81). He also admitted knowing that the PKK engaged in attacks on the village guards and that they, in general, advocated "revolutionary terror" (Tr. at 67-68; 90).

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[5] As noted above, this finding of fact by the Immigration Judge is not clearly erroneous in light of the implausibility of the respondent's testimony that all of his arms were for personal use and in light of the expert witness's testimony that the respondent fit the profile of a PKK fighter.

The record thus supports the conclusion that the respondent knowingly assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state. Specifically, these admissions, amounting to knowing assistance in fund-raising, rebut the respondent's claim of having no knowing role in furthering the persecuting activities of the PKK. Moreover, we specifically reject the argument by the respondent that he did not assist in the persecution of others since the "victims" of the PKK were not targeted on account of a protected ground. *See* Respondent's Brief at 87-88. In fact, those targeted for violence by the PKK included Turks or Kurds who aligned themselves with the Turkish government and not the PKK. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force at 10-11. The victims of the violence included teachers and village guards (and the wives and children of guards) who were killed to discourage civilians from aligning themselves with the state. *Id.* The PKK's targeting and intimidation of these civilians is classic persecution on account of political grounds in the same way that it is persecution on account of political opinion for a government to persecute suspected opposition sympathizers who have done nothing to cause them to become the target of law enforcement.

Finally, we agree with the Immigration Judge's conclusion that *Matter of Rodriguez-Majano, supra,* in which we found that activity related to a civil war directed toward the overthrow of a government was not persecution of others, is distinguishable from the respondent's case. *See* I.J. at 26-27. First, in *Matter of Rodriguez-Majano, supra,* the sum total of the alien's activity with the guerillas consisted of driving supplies

to a battle with government soldiers on one occasion, undertaking military training, and providing cover" with his weapon on one occasion. *Matter of Rodriguez-Majano, supra*, at 813. Conversely, the respondent was involved for years with the ERNK and participated in meetings, fund-raising, and propaganda delivery. Also, the PKK *targeted* civilians and not just government soldiers (Tr. at 89-90; 92); the deaths of the civilians were not in any way "incidental," as the respondent argues. *See* Respondent's Brief at 83. Moreover, as the Immigration Judge noted, the alien in *Rodriguez-Majano* was seized by the guerillas and forced to participate with them, whereas the respondent voluntarily joined the ERNK due to his willingness to support that organization, which, he admitted, was affiliated with the PKK. Tr. at 75. Accordingly, there is no basis for a finding that the respondent's activities with the ERNK are not "persecution" because they were akin to the civil war-related activities of the alien in *Rodriguez- Majano, supra*.

VII. Aggravated Felony

The Immigration Judge found that the respondent's conviction for separatism in violation of Article 125 of the Turkish Penal Code constitutes an aggravated felony under sections 101(a)(43)(A) (murder) and 101(a)(43)(F) (crime of violence) of the Act With regard to these findings contained in section D of the Immigration Judge's opinion (pp. 27-36), we find that this charge was not proven by clear and convincing evidence. *See Woodby v. INS*, 385 U.S. 276 (1966). We will therefore vacate the Immigration Judge's order to the extent that it finds that the respondent is an alien convicted of an aggravated felony.

We note that the crime of which the respondent was convicted, separatism, does not have a counterpart in the aggravated felony definitions contained at section 101(a)(43) of the Act. We have declined to find an alien convicted of an aggravated felony if the nature of the conviction did not correspond to one of the listed categories of an aggravated felony set forth at section 101(a)(43) of the Act. *See, e.g., Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (finding burglary of a motor vehicle not defined as an aggravated felony under section 101(a)(43)(G) of the Act). Similarly, with regard to convictions for crimes involving moral turpitude, we have stated that a foreign conviction must bear substantial similarity to conduct that is deemed criminal by United States standards. *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978). We have taken the categorical approach to determining whether a conviction raises the prospect of deportability, which means that the Board looks only to the nature of the offense as defined by the statute rather than to the factual circumstances surrounding any particular violation. *See Matter of Teixeira*, 21 I&N Dec. 316, 318 (BIA 1996) (firearms offenses); *Matter of Alcantar*, 20 I&N Dec. 801, 812 (ETA 1994) (crime of violence); *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989) (crime involving moral turpitude). The respondent's conviction for separatism is defined by Turkey as occurring whenever someone "commits an act intended to put the entire or a part of the territory of the State under the sovereignty of a foreign state or to decrease the independence or to separate a part of its territory from the Administration of State." *See* Exh. 2, Tab F. On its face, the statute does not clearly contemplate murder, hence, we cannot find that it constitutes an aggravated felony under section

101(a)(43)(A) of the Act. Nor are we convinced, for purposes of section 101(a)(43)(F) of the Act, that violence is an element of the offense or that there is, on this record, clear and convincing evidence that the crime involves a substantial risk of physical force. We note in this regard that the nature of the respondent's final conviction remains unclear; although the punishment for separatism is "death," the respondent's sentence was reduced several times and finally was set at under 5 years. *See* DHS Exh. SS. As previously indicated, the respondent admits he was released after serving 18 months. Exh. 6. The record thus does not clearly and convincingly reflect that the respondent has been convicted of the aggravated felonies at issue here.

In light of our findings above, we need not address the respondent's argument that the conviction was final for immigration purposes in 1990 (i.e. prior to his entry into the United States) and, therefore, cannot be considered a final conviction at "any time after admission" as required under the Act's definition of an aggravated felony. *See* § 237(a)(2)(A)(iii) of the Act.

VIII. Terrorism Charges

Because we find that the record clearly reflects that the respondent provided material support to terrorists and that he solicited funds that supported terrorist activity, we affirm the Immigration Judge's findings with regard to the respondent's deportability under section 237(a)(4)(B) of the Act. *See* I.J. at 45-54. The Immigration Judge relied to a substantial degree on the respondent's admissions that he (1) was a member and organizer of the ERNK (Tr. at 72); (2) knew that the ERNK was affiliated with the PKK (Tr. at 80-85); (3) felt that he was "associated with" the PKK (Tr. at 101); (4) knew that the PKK engaged in violence (Tr. at

89-90; 92), (5) knew that the money raised by the ERNK helped support the PKK (Tr. at 81, 125); and (6) admitted attending a PKK military training camp and receiving training in weapons and propaganda (Tr. at 93-100, 147, 175). Based on these admissions, the Immigration Judge found that the respondent helped provide, at a minimum, funding to the PKK, and propaganda and education services to the ERNK. This finding is not clearly erroneous (I.J. at 45-51). Moreover, the respondent's admissions that he conducted propaganda and raised funds that he knew would go to the PKK belie his argument that he had no "intent" to engage in terrorist activity. *See* Tr. at 81-83 (respondent spoke at pro-Kurdish events where he solicited funds and where PKK flag was displayed). The record reflects that even before the PKK was designated as a terrorist organization in 1997, the respondent understood the organization to be conducting terrorist activity. *See* Tr. at 89-90; 92 (respondent aware that the PKK was fighting with the "village guards," a group of civilians who were aligned with the Turkish government against the PKK); *see also Denshvar v. Ashcroft*, 355 F.3d 615, 627-28 (6th Cir. 2004) (alien can engage in terrorist activity even where his organization has not yet been "designated" as terrorist organization). We therefore see no error in the Immigration Judge's determination that the respondent is removable as an alien who provided material support to terrorists and who solicited funds to support a terrorist organization. *See Singh-Kaur v. Ashcroft*, 385 F.3d 293, 300-01 (3d Cir. 2004). Because "material support" encompasses anything that has a "logical connection" to the aims of the terrorist organization, we view the provision of funding and propaganda as directly furthering the goals of the

organization and thus providing material support under section 237(a)(4)(B) of the Act. *See Singh-Kaur v. Ashcroft, supra.*

We also disagree with the respondent's assertion that the ERNK cannot be considered an organization that funded the PKK since it is not currently listed as such on the United States Treasury Department's list of "Specially Designated Nationals and Blocked Persons" ("SDN"). *See* Respondent's Brief at 56-58. First, the respondent himself admitted knowing that the money he raised for the ERNK would in part go to support the PKK (Tr. at 82-85). In addition, the Immigration Judge found that the record supported the conclusion that the ERNK raised funds for the PKK. (I.J. at 6, 45-51). As we have stated, this finding is not clearly erroneous. Furthermore, the failure to add the ERNK to the current SDN today does not mean that the ERNK was not a source of funding for the PKK at one time. It is clear that since the PKK was originally added to the SDN list in 1997, significant changes have occurred in the PKK/ERNK organization. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force at 7. In any event, the respondent's argument fails to rebut the other evidence of record indicating that the ERNK helped fund the PKK.

Our conclusions with regard to the respondent's removability under section 237(a)(4)(B) of the Act are supported by the testimony of both expert witnesses, who stated that the ERNK operated as a political or popular front for the PKK and that it supported the operations of the PKK and the armed faction of the PKK (i.e., the ARGK) in a significant way (Tr. at 411, 693). The connection between the ERNK and the PKK

is also supported by the documentary evidence of record. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force. The evidence of record also supports the escalating violence that characterized the Kurdish separatist movement in general and the PKK operations in particular in the mid- to-late 1980s, when the respondent was active with the ERNK. *See* Exh. 2, Tabs A, I; DHS Exhs. P, R, W, Y. Based upon the respondent's knowledge of the activities of the PKK, the documentary evidence of record, and the testimony of the experts in this case, the respondent should reasonably have known that the PKK was an organization that had committed or planned to commit terrorist acts. *See* sections 212(a)(3)(B)(iv)(IV) and (VI) of the Act; *see also Singh-Kaur v. Ashcroft*, *supra*, at 300. Our conclusion that the Immigration Judge correctly found that the record indicates that the respondent is removable under section 237(a)(4)(B) holds without regard to the Immigration Judge's use of the Turkish conviction documents and without resort to the use of the "*Pinkerton*" doctrine. In light of our findings regarding the respondent's material support to, and fund-raising for, the PKK, we need not address the arguments raised with regard to the respondent's removability as an alien who has incited or committed a terrorist act as described in section 212(a)(3)(B)(iv)(I) of the Act.

Finally, we also reject the respondent's argument that application of the removability provisions at section 237(a)(4)(B) is an unconstitutionally retroactive application of amendments to the Act brought about by the Immigration Act of 1990 ("IMMACT"). The respondent argues that the inadmissibility provisions of the IMMACT have never been applied to an alien

like him, since he is alleged to be removable (although not inadmissible) for "terrorist activity" that took place before the effective dates of the IMMACT and the alien's date of entry. *See* Respondent's Brief at 58-61. The respondent also argues that he should not be found removable for the "same conduct that warranted granting him asylum ... in 1992." *Id.* at 50. The respondent offers no legal reason why recent amendments to the Act, which clearly intend for retroactive application of the removability provisions of section 237(a)(4)(B) (referencing inadmissibility provisions relating to terrorism), should not apply to his case. *See* USA PATRIOT Act at § 411 (contained in the record as DHS Exh. YY); *see also Bell v. Reno*, 218 F.3d 86, 95 (2d Cir. 2000) (applying removability provisions amended by the IMMACT to alien whose removal proceedings initiated after the IMMACT's effective date and conduct causing alien's deportability occurred before enactment of the IMMACT). Moreover, the former INS's decision to approve the respondent's asylum application does not preclude the DHS from initiating removal proceedings against the respondent now, particularly in light of the material omissions in the respondent's original asylum application. *See, supra,* sections IV and V of this Order.

Furthermore, our conclusions in this regard are supported by the language chosen by Congress in the recent enactment of the REAL ID Act. *See* "Real ID Act of 2005," Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, (Public Law 109-13) (May 11, 2005). The REAL ID Act expanded and amended the removability provisions at

section 237(a)(4)(B) pertaining to terrorism and expressly made these amendments applicable to all aliens who are placed into removal proceedings before, on, or after the date of enactment. *See* §§ 103, 105(a)(2)(B) of the REAL ID Act. Thus, to the extent that the respondent argues that the retroactivity of section 237(a)(4)(B) of the Act was left unclear after the USA PATRIOT Act, the clear intent of Congress in the REAL ID Act trumps that argument. *See* Respondent's Supplemental Brief at 3-8. We also note that the REAL ID Act did not limit the applicability of section 237(a)(4)(B) by adding language stating that the provision would only apply if the alien was inadmissible at the time of entry or deportable under another terrorism-related provision (such as, according to the respondent, the terrorism-related provisions of the IMMACT). *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (statutory construction ends if words of Congress are clear). That is, the respondent is not entitled to a "pass" with regard to the Act's terrorism deportability provisions simply because he entered before the terrorism exclusion provisions became effective. The REAL ID Act, by making no distinction regarding when the terrorism-related conduct occurred, renders that argument meritless.

IX. Convention Against Torture

We turn now to the respondent's application for relief under the Convention Against Torture. Given our previous findings, the relevant question is whether the respondent has shown eligibility for deferral of removal under the Convention Against Torture by proving that it is more likely than not that, upon return to Turkey, the Turkish government will torture him or will acquiesce in his torture. The Immigration Judge

correctly set out the standards for determining whether an applicant under the Convention Against Torture has presented a legally cognizable claim for relief. That is, an alien must show that it is more likely than not that he will be harmed by an intentional act causing severe mental and/or physical pain, that the act would be inflicted for a proscribed purpose under the Act and that the act would be inflicted by or at the instigation of a public official or with the acquiescence of a public official with custody or control of an individual. *See* 8 C.F.R. § 1208.18(a); *Matter of J-E-*, 23 I&N Dec. 219 (BIA 2003).

The two primary groups that the respondent claims to fear, for purposes of his Convention Against Torture claim, are the Turkish government itself and the PKK. The respondent argues that the PKK will seek him out for torture as retribution for his prior confession in connection with his criminal case. *See* Respondent's Brief at 89-93. We find that the respondent's fear of the PKK is not sufficiently supported by evidence from the record; we note in particular that the respondent lived in Turkey for a year after being released from prison without any retaliation from the PKK (Tr. at 150-51). Furthermore, the record does not indicate that even if the PKK would seek to torture the respondent, Turkish officials would *acquiesce* in that torture. *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). "Acquiescence to torture 'requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene and to prevent such activity.'" *Id.* at 1311. A showing that the Turkish government is unable to control the PKK is therefore inadequate to satisfy the burden of proving

entitlement to deferral of removal under the Convention Against Torture. The respondent's assertions that the Turkish officials work closely with the Kurdish village guards does not prove, as he asserts, that the "Turkish government accepts, and even encourages, Kurdish murders of fellow Kurds." *See* Respondent's Brief at 94. First, the evidence on which this argument is based is out of date and therefore not probative of the current situation in Turkey. Second, the allegation that the Turkish government pits Kurds against Kurds as a way to quell the separatist movement does not in any way indicate that the government would be aware of, and would assent to, current plans of the PKK to torture the respondent.

With regard to the respondent's claim that he is in danger of torture from Turkish officials, we find that although there is some evidence that the respondent may face a possibility of mistreatment in Turkey, the record does not indicate that torture is more likely than not, as required by the Act. We acknowledge the respondent's argument that his return to Turkey would not go unnoticed. In addition, there is no doubt that the PKK is still the focus of significant law enforcement efforts in Turkey, and recent documents concerning country conditions reflect that in battling the PKK, Turkish security forces continue to commit "serious human rights abuses." The 2002 State Department Country Report for Turkey states that the use of torture is "regular[]," "widespread" and "pervasive" by security forces. *See* Exh. 2, Tab S at 5. The torture was administered by local level authorities regardless of whether it was sanctioned by higher authority. *Id.* The fact that the respondent has been associated with

the PKK renders him vulnerable to notice by these security forces, many of whom apparently operate with impunity in certain regions of the country, including the southeast, where the respondent's family is from and where many Kurds live. *See* Tr. at 509 (respondent stating that he grew up in area of Turkey near Syrian border); DHS Exh. LL (map of Turkey showing Turkey borders Syria to the southeast); *see also* Exh. 2, Tab S at 5-6. At the same time, we recognize that evidence of vulnerability to torture and the *possibility* of torture do not satisfy the high burden of proving that torture is "more likely than not." 8 C.F.R. § 1208.17(a). The evidence of record reflects that reports of torture in Turkey are decreasing. Exh. 2, Tab S at 5. Turkey has, in general, taken several steps to eliminate abuses and extra-judicial activities in support of its effort to join the European Union. *Id*; *see also* DHS Exhs. CC, DD, EE. Furthermore, it is undisputed that the respondent served his sentence and was not re-indicted or retried in his absence; there is likewise no evidence that the government still seeks him for any reason connected with his activities with the ERNK in the 1980s. *See* I.J. at 57-58. Overall, the evidence of record does not reflect that upon respondent's return to Turkey, torture is more likely than not. Accordingly, the Immigration Judge properly denied his application for a grant of deferral of removal under the Convention Against Torture.

X. Conclusion

We therefore affirm the Immigration Judge's decision, insofar as she found the respondent removable under sections 237(a)(1)(A) as an alien inadmissible at time of entry or adjustment of status under section 212(a)(6)(C) (fraud or misrepresentation

of a material fact) and inadmissible as an alien who applied to adjust status under section 209(b) but who is no longer a refugee under section 101(a)(42)(A) of the Act. We also affirm the Immigration Judge's findings that the respondent is an alien who is a persecutor of others under section 241(b)(2)(i) of the Act (rendering him ineligible for withholding of removal) and that the respondent is an alien who is removable under section 237(a)(4)(B) as an alien who has solicited funds for a terrorist organization and who has provided material support to a terrorist organization, as set forth in sections 212(a)(3)(B)(iv)(IV) and (VI) of the Act. We vacate the Immigration Judge's finding that the respondent is an alien convicted of an aggravated felony. Finally, we affirm the Immigration Judge's denial of relief under the Convention Against Torture. Accordingly, the following orders will be entered:

ORDER: The Immigration Judge's order is affirmed with respect to her findings that the respondent is removable under sections 237(a)(1)(A) and 237(a)(4)(B) of the Act and to her denials of all applications for relief.

FURTHER ORDER: The Immigration Judge's findings regarding the respondent's removability under section 237(a)(2)(A)(iii) of the Act are vacated.

/s/ [illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: A71-803-930	)	
	)	
In the Matter of:	)	**IN REMOVAL PROCEEDINGS**
	)	
PARLAK, Ibrahim	)	
	)	
RESPONDENT	)	
	)	

Charges: **Section 237(a)(1)(A) of the Immigration and Nationality Act ("Act" or "INA")**, as amended, in that you are an alien who at the time of adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: an alien who, by fraud or willful misrepresentation, sought to procure a benefit under the Act pursuant to section 212(a)(6)(C) of the Act.

Section 237(a)(1)(A) of the Act, as amended, in that you are an alien who at the time of adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: at the time you applied to adjust your status under section 209(b) of the Act you did not continue to be a

refugee within the meaning of section 101(a)(42)(A) of the Act, in that you were a person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 237(a)(2)(A)(iii) of the Act, as amended, in that you are an alien who has been convicted of an aggravated felony after admission, to wit: murder pursuant to section 101(a)(43)(A) of the Act.

Section 237(a)(2)(A)(iii) of the Act, as amended, in that you are an alien who has been convicted of an aggravated felony after admission, to wit: a crime of violence (as defined in section 16 Title 18, but not including a purely political offense) for which the term of imprisonment is at least 1 year pursuant to section 101(a)(43)(F) of the Act.

Section 237(a)(4)(B) of the Act, as amended, in that you are an alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 212(a)(3)(B)(iv) of the Act), to wit: you have engaged in "terrorist activity" within the meaning of section 212(a)(3)(B)(iv)(I) of the Act.

Section 237(a)(4)(B) of the Act, as amended, in that you are an alien who has engaged, is engaged, or at anytime after admission engages in any terrorist activity

(as defined in section 212(a)(3)(B)(iv) of the Act), to wit: you have engaged in "terrorist activity" within the meaning of section 212(a)(3)(B)(iv)(IV)(cc) of the Act.

Section 237(a)(4)(B) of the Act, as amended, in that you are an alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 212(a)(3)(B)(iv) of the Act), to wit: you have engaged in "terrorist activity" within the meaning of section 212(a)(3)(B)(iv)(VI)(aa), (bb), and (dd) of the Act.

Application: Convention Against Torture

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DECISION AND ORDER OF IMMIGRATION JUDGE

I. BACKGROUND

Ibrahim Parlak ("Respondent"), is a native and citizen of Turkey. He was admitted to the United States on or about April 13, 1991, as a non-immigrant in transit on a C-1 visa. On July 15, 1992, he was granted asylum by the former Immigration and Naturalization Service ("the Service").[1] See Exhibit 2, Tab A (Respondent's "I-589" Application for Asylum). On June 1, 1994, he adjusted status to that of a lawful permanent resident under Section 209 of the Act. See id. at Tab C (Respondent's "I-485" Application for Adjustment of Status). On August 24, 1998, he filed an application for naturalization.

On September 17, 2001, Respondent filed a Complaint for Declaratory Judgment of Naturalization against the District Director of the Service in the U.S. District Court for the Western District of Michigan. On November 28, 2001, the Service denied Respondent's application for naturalization, and on

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[1] The functions of the former Immigration and Naturalization Service were subsumed into the newly-established Department of Homeland Security ("DHS") in 2003. Because this matter overlaps the abolition of the Service and the creation of the DHS, the Court will use both titles interchangeably.

December 26, 2001, Respondent requested an administrative appeal before the Service regarding the denial of his application. Subsequently, pursuant to stipulation, the District Court dismissed Respondent's Complaint for Declaratory Judgment of Naturalization.

On April 2, 2002, the Service issued Respondent a Form I-862 Notice to Appear ("NTA") placing him in removal proceedings and charging him with being removable on the first two counts captioned above pursuant to Section 237(a)(1)(A) of the Act. See Exhibit 1. Specifically, the Service alleged Respondent made false statements on his application for adjustment of status regarding whether he had ever been arrested or imprisoned and whether he had ever engaged in terrorist activity. The Service averred that Respondent had previously been arrested and imprisoned in Turkey in 1988 on suspicion of being a member of the Kurdistan Workers' Party ("PKK"), an organization which was designated as a Foreign Terrorist Organization by the U.S. Department of State in 1997 pursuant to Section 219 of the Act. See 62 Fed. Reg. 52650 (Oct. 8, 1997). The Service also alleged Respondent was ineligible to adjust status at the time he did so because he was not a refugee within the meaning of Section 101(a)(42)(A) of the Act. Namely, it argued Respondent's political activities in Turkey and his relationship to the PKK meant he was a persecutor of others and, thus, could not be considered a refugee under Section 101(a)(42)(A) of the Act. At a hearing on February 11, 2004, the Service called

Special Agent John Owens to testify in support of its arguments.[2]

During proceedings, Respondent denied the two charges of removability. He admitted factual allegations 1, 2, 3, 4, 5, and 11 in the NTA and denied factual allegations 7, 8, and 14. The Service subsequently withdrew factual allegations 6, 9, 10, 12, and 13. See Exhibit 1. Respondent testified on February 11, 2004, and argued that his failure to disclose his arrest was immaterial because he had disclosed that information previously on his original application for asylum in 1991. He also asserted that his activities in Turkey were not those of a terrorist, that he had never persecuted anyone or participated in the persecution of anyone, and that he had no contact with the PKK since 1988. Consequently, he asked the Court not to sustain the charges and to terminate the proceedings.

Prior to the issuance of the Court's decision, on April 26, 2004, the Service filed a motion to reopen evidence.[3] The Service asserted it had additional documents relating to the criminal charges against Respondent in Turkey for being a member of the

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[2] Agent Owens testified Respondent's A-file had been referred to him in April 1999, as Respondent's naturalization application indicated he had been a member of the PKK, a designated Foreign Terrorist Organization. Owens presented FAS and ICT Reports, which had been downloaded from the Internet. See Exhibit 2, Tabs H & I. Notably, the reports provided only generalized information about the PKK, and Owens could not vouch for the veracity of the documents.

[3] The April 26, 2004 motion did not contain a certified translation of the Turkish court documents. Subsequently, on July 29, 2004, the Service filed an amended motion to reopen evidence which included a certified translation of these documents.

terrorist organization PKK. Specifically, the Service claimed these documents indicate the Turkish government had an ongoing criminal case against Respondent for membership in the PKK. Further, the documents showed Respondent's conviction stemmed from the murder of two Turkish soldiers.

On August 5, 2004, the Service lodged two new factual allegations and two additional charges against Respondent claiming he is removable pursuant to Section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony, to wit: murder and a crime of violence. See Exhibit 1A (Form I-261). On August 18, 2004, Respondent filed a response to the I-261 with the Court and denied the new allegations numbered 14 and 15, and denied the two additional grounds of removability. On October 14, 2004, the Service replaced allegations 6 and 14 on the NTA with two new allegations. See Exhibit 1B (I-261). Further, on October 14, 2004, the Service issued factual allegations 16-23 against Respondent, and filed three additional charges of removability under Section 237(a)(4)(B) of the Act. See Exhibit 1C (I-261). Respondent presumptively denies the new allegations and charges of removability.

At a hearing on December 6, 2004, the Service called Special Agent Robert Miranda to testify in support of the new allegations and charges. Respondent testified as both an adverse witness and on his own behalf. He also provided the testimony of Professor Michael M. Gunter to support his claim. The hearings in this matter were completed on December 7, 2004.

For the reasons set forth below, the Court now finds the charges of removability have been proven by

evidence that is clear and convincing as required under Section 240(c)(3) of the Act and 8 C.F.R. § 1240.8(a). Respondent has applied for relief under the Convention Against Torture. The Court will address his eligibility for relief in Part IV below.

II. STATEMENT OF FACTS

Respondent, an ethnic Kurd and citizen of Turkey, was born in Gaziantep, Turkey on May 1, 1962. He began his participation in the Kurdish movement in 1975 when he joined the PDA. In this capacity, Respondent attended meetings, seminars and protests concerning the Kurdish freedom movement. In 1978, he left the PDA and joined the Kurt-Ulusal organization. According to Respondent, this organization was created to spark the Kurdish movement. He attended political protests on behalf of this organization. Although Respondent was not deeply involved in the Kurt-Ulusal, he admits the PKK (The Kurdish Workers' Party) was formed out of this organization.

On November 26, 1978, Respondent participated in a demonstration against the Turkish government in Gaziantep, Turkey by handing out leaflets, pamphlets and hanging posters. He claimed he was arrested by the police and held in custody for three months where he was tortured. He further claimed he was released by the court due to insufficient evidence.

On June 16, 1980, Respondent traveled to Germany where he attended meetings in Berlin addressing Kurdish freedom. In 1982, he purportedly began engaging in propaganda on behalf of PKK in Germany. See Government Exhibit A, p. 18 (March 24, 2004 Conviction Record). According to Respondent, he was a political speaker and organizer for Kurds in Western

Europe between 1980 and 1987, and carried out these activities on behalf of the National Liberation Front of Kurdistan ("ERNK") as well as other Kurdish groups. He claimed he joined ERNK in 1985 after it had been founded in 1984, and he acknowledged that ERNK had close ties to the PKK. Although Respondent indicated in his asylum application that he was a "leading member" of ERNK, at the February 2004 hearing he claimed he was not a central figure of ERNK and that the phrase "leading member" was not his.[4]

In 1981, when Respondent's Turkish passport was about to expire, he attempted to get it extended at the Turkish consulate in Berlin. However, the consulate told Respondent he should return to Turkey because he was wanted by the Turkish police. He claimed his passport was then revoked. After this, Respondent began traveling on a false passport.

According to Respondent, his involvement with the PKK related to fostering propaganda which was unrelated to the military wing of the PKK.[5] The PKK

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[4] At the December 2004 hearings, Respondent admitted he was the leader of the group of ERNK members who crossed the Syrian/Turkish border.

[5] Notably, Respondent claimed he did not advocate violence on behalf of the ERNK or the PKK; yet, he stated in his asylum application that he is no longer involved with the ERNK because he "would like to live a peaceful life." Further, on September 19, 2003, the FBI, pursuant to a letter rogatory request from the Turkish government, asked Respondent to comment on his criminal conviction in Turkey relating to his association with the PKK. In response, Respondent stated:

> The only new thing I can say, I'm not the same guy. I'm not the same teenager. So, I start a new life. And I'm glad, I'm happy that I made it through to be able to come here to the United States and start a new life.

was designated a Foreign Terrorist Organization (FTO) under § 219 of the Act on October 8, 1997. Respondent maintained that during his association with the PKK (from 1985 through 1991, before it was designated a FTO) he had no knowledge that the PKK engaged in terrorist activity. Respondent claimed the ERNK supported the PKK in two ways: (1) by acting as its propaganda wing, and (2) by providing financial support. He engaged in propaganda on behalf of the ERNK in Europe by organizing meetings, conducting seminars, handing out literature, and publishing magazines. He also participated in fundraising on behalf of the ERNK for the PKK by organizing meetings and Folkloric music events in various parts of Europe. The PKK flag was present at these events and speakers strongly requested the audience to support the PKK. According to Respondent, portions of the money raised at these events went to the PKK, but he asserted he was not involved in the money transfers from the ERNK to the PKK.

In September 1987, Respondent traveled from Germany to Syria and then to a PKK camp in the Bekaa Valley in Lebanon where he stayed for eight months. Before he entered the camp, Respondent met the PKK leader, Abdullah Ocalan. While there, he stated he underwent military training, including firearms training using the M-16, the Russian AK-47, and rifles. Respondent observed shoulder rocket launchers at the PKK training camp, but did not train with them because his "jurisdiction" was organization and coordination, not military. According to

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See Exhibit 5, p. 4. As late as February 11, 2004, Respondent testified before this Court that although he does not agree with the PKK's military tactics, he would defend the PKK today.

Respondent, other "groups" at the camp trained with rocket launchers.

Respondent claimed he never formally became a member of the PKK while at the camp. According to him, the purpose of this camp was to recruit members and to obtain training. Although at one point Respondent stated he attended the camp for "guerilla training", he later claimed he learned "survival training". Further, he compared the PKK camp to a refugee's camp, stating that people of all ages attended the camp, including children, women, and the elderly. He estimated that 200 to 300 people trained at the PKK camp when he was there. According to Respondent, he attended the PKK camp to learn how to survive in the mountains so he could return to Turkey surreptitiously to engage in protests and propaganda on behalf of the PKK.[6]

Respondent's training at the PKK camp ended in May 1988. At that time, he left the camp to journey back to Turkey with other members who attended the PKK camp. Respondent and five other PKK camp attendees formed a group called "Revenge Group of Sinan Cemgil".[7] Before entering Turkey, the group

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[6] Respondent claimed he would be in danger if he returned to Turkey. Yet, he still wanted to return to Turkey to accomplish his political goals. Notably, Respondent traveled on a false passport in Europe and to Syria, and also upon departing Turkey to come to the United States. However, he claimed his only way of entering Turkey in 1988 was by illegally crossing the border from Syria. He testified he had to enter the country without being noticed because if noticed, his whole "mission" would be in jeopardy.

[7] The March 24, 2004 conviction record indicates Respondent belonged to a group called "Revenge Group of Sinan Cemgil". See Govt. Exhibit A, p. 28. Yet, Respondent claimed the proper name of the group was "Propaganda Group of Sinan Cemgil."

met with Abdullah Ocalan, the PKK leader, to discuss their mission. At this time, Ocalan gave the group a farewell speech. The group members were then given fake identification, money and books. The group went to another location where they obtained guns, ammunition, grenades and explosives. Respondent claimed he was given an AK-47, pistols, ammunition, grenades, explosives, and provisions for survival for one week. The group met another PKK member and three Syrian guides at the border area to help them cross the border. Both Respondent's group and the guides were armed with AK-47 machine guns. At the Syrian/Turkish border, where Respondent's group and the guides were forced to cross a minefield and a fence, Respondent and his group encountered Turkish soldiers.

Respondent has given contradictory accounts as to what happened when he encountered the Turkish soldiers. Before the Service placed him into immigration proceedings, Respondent claimed he was involved in the gunfight. See Exhibit 2, Tab A, pp. 9-10 (Respondent's Asylum Application). After he was placed into proceedings, he claimed only the guides were involved in the firefight. For example, in his asylum application, Respondent made no mention of "guides" being present with his group. See Exhibit 2, Tab A, pp. 9-12. Rather, he stated he and his friends engaged in a gunfight where three of his friends were shot. See id. Respondent did not identify in his asylum application who the gunfight was with, but he stated "we" returned gunfire. See id. Further, a newspaper article Respondent attached to his asylum application supports his initial position that he was engaged in the firefight:

> After being trained in the "camp Helve of PKK organization", in the Bekaa Valley of Lebanon, on May 21, 1988, he [Respondent] was trying to enter Turkey from the Syrian border when he had an armed encounter with soldiers in the Martaventepe district of Kilis. After his involvement in the martyrdom of solders [sic] Serif Kaya and Dincer Demir, last year on October 29 he was apprehended in the Pazarcik area shelter of the organization.

See Exhibit 2, Tab E, pp. 8-9.[8]

Turkish conviction records from the criminal case against Respondent for the murder of the two soldiers support Respondent's original position that he was involved in the firefight. For example, the official findings of the court indicate that everyone present, including Respondent, fired their weapons at the soldiers. See Govt. Exhibit A, pp. 30-31. These documents also indicate Respondent dropped a grenade at the location where the soldiers were stationed. See id., pp. 18-19, 21, 31. Further, after the firelight, one of the members in Respondent's group retrieved a weapon from one of the soldiers. See id., pp. 21.

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[8] This passage was selectively left out of Respondent's translation of the newspaper article attached to his asylum application. Instead, Respondent's translation only included statements establishing he was jailed by the Turkish government. See Exhibit 2, Tab A, pp. 27, 28. Respondent's translation did not mention his involvement in the murder of the two Turkish soldiers. See id. The person who translated this document for Respondent traveled with him from Turkey to the United States and even submitted a letter on Respondent's behalf in support of his asylum application. See Exhibit 2, Tab 2, p. 22.

In contradiction to his asylum application, the newspaper article and the Turkish conviction records, Respondent testified before this Court at his individual hearing on February 11, 2004 that neither he nor his group fired their guns, but rather it was only the guides who engaged in the gun fight with the Turkish soldiers. At the December 2004 hearings, he also maintained that he did not fire his gun at anyone during the incident. He claimed he lost a grenade during the commotion, but stated it did not explode.

After the gunfight on the Syrian/Turkish border, Respondent and his group retreated into Syria. On June 1, 1988, Respondent successfully entered Turkey through the Syrian mountains.[9] After crossing the border, Respondent and his associates buried guns and ammunition at a mineral mine in the mountains. The following day, Respondent and his associates prepared a depot and placed additional guns and ammunition in the depot. For security reasons, they soon prepared a new depot and transferred the guns and ammunition to that depot.

On July 30, 1988, Respondent's group sent an organizational note to another PKK group who had previously entered Turkey. His group dug a shelter at their location and then left to another location. At the new location, a member of Respondent's group left to deliver the remainder of the ammunition to another PKK group. Respondent remained alone at this location for approximately 15 days.

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[9] The March 24, 2004 conviction record states that at this time Respondent was in the position of unit commander of the PKK's military wing (ARGK). See Govt. Exhibit A, pp. 18-19. However, Respondent denied being affiliated with ARGK.

Next, Respondent received word that three of his group members were killed. Respondent's group then split up and traveled to meet with different PKK members. His group traveled to the village of Kamisli and built another shelter. The two groups reunited in September 1988. The united group returned to the mineral mine where they had previously stored guns and ammunition. Respondent and his group transferred the guns and ammunition to one of the shelters they previously built.

According to the March 24, 2004 conviction record, while at the shelter, Respondent rebuffed the request of one of his members to leave the group. See Govt. Exhibit A, p. 36. Other group members left the shelter to conduct surveillance. These members were apprehended by the Turkish military. The captured members informed the military of the location of Respondent's group at the shelter. Respondent and his group were arrested without incident in October 1988. At the shelter, the military confiscated guns, ammunition, explosives and organizational publications. Respondent agreed to cooperate with the Turkish government by invoking the "code of confession."[10] For instance, he showed the soldiers where he and his fellow group members hid the arms

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[10] The "code of confession" appears to be a law in Turkey that affords defendants who admit their guilt and cooperate with the government a dramatic reduction in sentence. This is evidenced from Respondent's conviction records. Perhaps most telling is Respondent's sentence was reduced from a life sentence to six years imprisonment. See Govt. Exhibit A, pp. 8-9, 39-42.

and ammunition they brought into Turkey from Syria. See Govt. Exhibit A, p. 19.[11]

Respondent was charged with violating Article 125 of the Turkish Penal Code (committing actions towards the separation of Turkey). See Exhibit 2, Tab A, p. 10; Govt. Exhibit A, p. 33. This conviction was premised on Respondent's participation in the murder of the two Turkish soldiers at the Syrian/Turkish border. Respondent was represented by an attorney during these criminal proceedings. He was convicted on March 19, 1990, and was sentenced to 4 years, 2 months imprisonment. Respondent received a substantial reduction in his sentence because he invoked the "code of confession" and cooperated with the Turkish government.[12] The prosecutor appealed that decision believing the trial court improperly reduced Respondent's sentence. Respondent did not appeal the decision and sentence. On April 8, 1991, the Turkish appeals court (Court of Cassation) quashed the Security Court' s decision, upholding the prosecutor's appeal. See Govt. Exhibit B, p. 6. It appears Respondent was released from custody at this point. See id.

Respondent gave two reasons in his asylum application for why he was released. First, he claimed his family paid a bribe securing his release. See Exhibit 2, Tab A, p. 10. Conversely, he presented a Turkish document with his asylum application which states he was released because the court found there

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[11] Notably, at the December 2004 hearing, Respondent testified the soldiers found nothing at the site.

[12] At the December 2004 hearing, Respondent, for the first time, claimed he gave a false confession.

was insufficient evidence to support the charge. See id., p. 25. A subsequent translation of this document by the Service established that the document made no mention of Respondent being released for insufficient evidence. See Exhibit 2, Tab E, p. 11.

Respondent left Turkey on April 13, 1991, using a fraudulent passport and entered the United States as a C-1 non-immigrant visitor in transit. He applied for asylum in the United States that same month. The Chicago Asylum Office granted Respondent's asylum application on July 15, 1992. His asylum claim was premised on his support of the PKK against the Turkish government. The bedrock of this claim was his 1988 arrest in Turkey for support of the PKK.

Respondent failed to disclose key facts in his asylum application. Specifically, he did not disclose that the gunfight at the Syrian/Turkish Border was with Turkish soldiers and that two soldiers were killed in the firefight. In fact, Respondent deliberately misled the asylum office. He attached to his asylum application a Turkish newspaper article with an English translation. The translation states Respondent is accused of being a PKK member and faces death by hanging, but makes no mention of Respondent being accused of killing two soldiers. See Exhibit 2, Tab A, pp. 27, 29.[13]

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[13] After Respondent was placed into immigration proceedings, the Service re-translated this newspaper article. The complete translation recounts in great detail the gun fight at the border between Respondent and the Turkish soldiers. See Exhibit 2, Tab E, pp. 8-9. Further, the article details how Respondent was standing trial for his participation in the murder of the two soldiers.

On July 22, 2004, the Service received evidence from the United States Department of Justice, Office of International Affairs that Respondent was re-sentenced in Turkey on March 16, 2004, to 6 years imprisonment for violating Article 125 of the Turkish Penal Code. See Govt. Exhibit A. This document indicates Respondent was convicted of committing terrorist actions against the Republic of Turkey by taking part in the 1988 killing of two Turkish soldiers in his capacity as group administrator of the PKK. The court reduced a possible life sentence to 6 years imprisonment because Respondent cooperated with the Turkish government. See id., pp. 38-41. The court suspended the execution of a portion of the sentence, mandating that Respondent serve only 1/5 of his six year sentence in prison (approximately 1.2 years). See id., p. 3. The court cancelled the 1995 arrest warrant against Respondent because he had already served more than 1.2 years in prison. See id., p. 41.

At the December 2004 hearings, both parties called an expert witness to provide testimony on the PKK. The Court notes both experts agreed that the PKK is a Marxist-Leninist organization, that the goal of the PKK is to create an independent Kurdish state, and that the organization is headed by Abdullah Ocalan. Both experts agreed the PKK killed civilians. While the Service's expert referred to the ERNK as PKK's "front wing"; Respondent's expert identified the ERNK as PKK's "political front." Both experts agreed that the ERNK raised money which may have been used for violence; and that the ARGK was the military wing of the PKK. The Court notes the discrepancies in the experts' testimony below.

The Service called Special Agent Robert Miranda to provide testimony as both a fact and expert witness on the PKK. Agent Miranda has been employed with the Federal Bureau of Investigation ("FBI") in Dallas, Texas for seven years. He is also a member of the Joint Terrorism Task Form ("JTTF"), which investigates international terrorism. He previously held the position of Special Agent with the United States Air Force, and worked in the Office of Special Intelligence ("OSI") for approximately ten years.

From 1990 to 1992, Miranda was assigned to Turkey as the Chief Officer In Charge of the Air Force OSI. In this capacity, his duties included reviewing all intelligence and counter-intelligence reports, determining terrorist threats in the region, and briefing general staff and the U.S. Embassy. He had also conducted investigations on the PKK and Dev Sole organizations. He described these two groups as leftist Turkish terrorist groups which arose out of the same leftist movement. Miranda's duties also included interfacing with the Turkish National Police, and meeting with the officers to discuss the structure, tactics and history of terrorists groups. The focus of these discussions were primarily on the PKK and Dev Sole.

In 1992, Miranda saw evidence of PKK training in a videotape seized from the PKK. This video depicted a camp in Bekaa valley with cinder block buildings, obstacle courses, and land mine training. PKK music played in the background of the video, which concluded with PKK militants armed with AK-47s killing Turkish patrol officers. Miranda perceived this video was used to recruit and raise funds for the PKK.

Miranda testified he met regularly with members of the Kurdish Democratic Party ("KDP").[14] He asserted the KDP did not support the PKK and would not let them in their territory. Miranda also testified about the Peshmerga, the Kurds of northern Iraq, whom he also met with regularly. He indicated the group had no real political connotations and was not comparable to the PKK. Specifically, he claimed unlike the Peshmerga, the PKK would infiltrate armed fighters across international borders, kidnap and kill teachers, and conduct indiscriminate attacks on civilians and tourists.

From 1993 to 1995, Miranda returned to Turkey as Commander of the OSI in Ankara. Again, he focused his investigations on the PKK and Dev Sole. In 1994, he had a personal experience with the PKK when he had to debrief a United States citizen who had been kidnapped by the PKK in southeastern Turkey.

Miranda testified the ERNK is the purely political front wing of the PKK, which is involved in fundraising, logistical support, and recruiting. He claimed that the ERNK is not a peaceful group, and that in 1993, Germany outlawed the ERNK and PKK because of its violent takeover of embassies in Europe. Respondent's expert merely alluded to the embassy events. Further, he agreed with Miranda that ERNK was part of PKK as its political front. Miranda stated the ERNK had more than just close ties to the PKK; it was part of the PKK.[15] Moreover, the money raised on

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[14] The KDP was most prominent in northern Iraq.

[15] Agent Miranda pointed out numerous "half-truths" in Respondent's asylum application. Specifically, he noted ERNK is part of the PKK; the ERNK goal was misstated in the application; and the armed infiltration across the Syrian border and the

behalf of ERNK went to the PKK and ARGK. Miranda claimed the ARGK is the military wing of the PKK, which was not walled off from the ERNK. Both the ERNK and ARGK supported the goal of forcible establishment of a Kurdish state in southeastern Turkey. Upon review of Respondent's testimony, Miranda opined that Respondent had transitioned from the ERNK to the ARGK, as his more recent activities were consistent with the ARGK. Specifically, Respondent went through military training at the PKK camp, used code names, and carried the tools of a fighter, such as a pistol and grenades.[16] Further, Miranda noted that entering Turkey through Syria was a dangerous way to enter the country merely for propaganda purposes. Moreover, the formation of a six person unit was consistent with guerilla activity.

Miranda indicated the meetings Respondent had with Abdullah Ocalan could denote his standing with the PKK or the importance of the meeting. Further, the line of march at the May 21, 1988 border crossing attempt also suggests Respondent led the group. Specifically, Respondent stood in the back of the line, the usual position of the leader for protective purposes. Moreover, his refusal to let a group member leave the group also identifies him as group leader. Miranda noted several other activities which were consistent with the ARGK and guerilla activities. Namely, illegally carrying in weapons, burying weapons, and digging spider hole shelters were consistent with the ARGK tactics. The Court finds Miranda's testimony

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"shelter" digging techniques were inconsistent with the ERNK activities.

[16] Indeed, Respondent even referred to himself as a "fighter" when testifying at the December 2004 hearing.

was consistent with U.S. Department of State Country Reports for Turkey and Patterns of Global Terrorism, and supports the Service's position.

Respondent provided the expert witness testimony of Dr. Michael M. Gunter, a professor of political science at Tennessee Technological University in Cookeville, Tennessee. Gunter's main area of research concerned the Kurdish people and politics. He has written several scholarly books and numerous articles on the Kurds. In 1998, he interviewed Abdullah Ocalan, the leader of the PKK in Syria and discussed the PKK organization. He has also advised the United States government, including the Central Intelligence Agency, Department of State and Department of Defense, on topics involving the Kurds and the PKK.

Gunter testified the Turkish persecution of its Kurdish minority has been a persistent problem. He noted the type of persecution inflicted on the Kurds depended on the magnitude of their actions and ranged from an initial warning to incarceration, or torture up to a death sentence. He claimed the Turkish government has sought to expunge the Kurdish language and custom from within Turkey's border. He noted the PKK played a very large role in the Kurdish issue in Turkey. Gunter claimed Ocalan formed the PKK because it was the only way to obtain Kurdish rights in Turkey. He testified the PKK would not have formed if not for the violation of Kurdish rights.[17] He

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[17] Professor Gunter provided an expert statement regarding Respondent in which he stated:

> The Turkish government has repeatedly outlawed Kurdish political parties that have pursued peaceful means of effecting reform. Because peaceful means of political redress by the Kurds were outlawed, militant

also asserted between the years 1980 to 1988, Kurds interested in non-violent advocacy of Kurdish rights did not really have an alternative to the PKK.

Gunter testified that in 1980, the PKK began fighting with other Kurdish groups and earned their reputation as terrorists. That same year, Ocalan and other PKK members escaped to Syria to build up the group's strength. In August 1984, the PKK launched two simultaneous attacks on the Turkish government. In 1985, the Turkish government instituted the village guard system, whereby pro-government Kurds were armed to fight the PKK. The village guard systems were set up in the "emergency zone", which covered eleven provinces in southeastern Turkey. Notably, the city of Gaziantep was never part of the emergency zone.[18] Gunter noted the majority of PKK and ARGK activities occurred in this area. Further, any ARGK activity in Gaziantep would be minimal.

Regarding Respondent's presence at the PKK camp, Gunter asserted that although it was a military camp, other non-military activities occurred at the camp. However, Gunter did not describe these non-military activities. Further, he claimed that a Kurdish supporter may have attended the camp to secure entry

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alternative for pursuing Kurdish rights like the PKK have gained support. [See Respondent's Exhibit 19].

[18] Respondent testified he entered Gaziantep when his group infiltr ated Turkey. He suggests that because he entered an area outside the emergency zone that ipso facto he did not engage in terrorist activity. The Court questions the significance of Respondent's assertion and notes that although the majority of PKK/ARGK activity occurred within the emergency zone, PKK/ARGK activity still occurred outside the zone. The Court also notes that Turkish teachers had been killed in Gaziantep. See Govt. Exhibit HH.

into Turkey, and that a non-violent supporter may have crossed the Turkish border surreptitiously. Gunter also provided testimony about the Turkish security courts. He claimed these courts were essentially military courts for civilians, which routinely used torture-induced confessions and other forms of harassment to convict Kurds under Article 125.[19] According to Gunter, the role of the security courts were to put a "veneer of legality on quick justice."

Contrary to Agent Miranda's testimony, Gunter asserted the relationship between the PKK and Dev Sole was minimal. He also claimed the PKK was unlike any other terrorist organization in that it focused on its primary opponent and rarely targeted United States opposition. However, when questioned about whether PKK ever attacked a NATO radar station, Gunter disputed the question in a dismissive manner. He also provided a dismissive response when asked if the PKK killed teachers, tourists or civilians. Finally, Gunter did not counter Agent Miranda's testimony regarding the differences between the Pershmerga and the PKK.

III. DISCUSSION

A. Credibility

The credibility of Respondent is of extreme importance in assessing his claim. The Court has considered the rationality, internal consistency, and inherent persuasiveness of Respondent's testimony in determining his credibility. For the reasons set forth below, the Court finds Respondent's testimony lacking credibility on several factors.

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[19] Article 125 made it a crime to advocate the division or separation of Turkey.

First, the Court notes the numerous omissions and misrepresentations in Respondent's asylum application. Specifically, his asylum application makes no mention of the death of two soldiers, nor of Respondent transporting arms and ammunition for PKK use on any incursions into Turkey. Further, Respondent claimed he was given a death sentence, yet never indicated his sentence was ameliorated for invoking the code of confession. He also claimed he was released from jail because his family paid a bribe; however, court documents indicate his conviction was quashed pending appeal by the prosecutor. Additionally, Respondent submitted a falsely translated newspaper article from Turkey which omitted key events, such as the firefight resulting in the death of two soldiers.[20] Notably, the submission by an applicant of a fraudulent document (i.e., the translations) not only discredits his claim, but also indicates an overall lack of credibility regarding the entire claim. Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998).

Second, Respondent provided inconsistent testimony regarding the May 21, 1988 gunfight at the border. According to Respondent's asylum application, the Turkish newspaper article attached to his asylum application, and his record of conviction, Respondent fired shots at the Turkish soldiers. However, at his individual hearing, Respondent abrogated most

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[20] While Respondent claims he fully disclosed all key events in his asylum application, the Court finds he did not. Respondent failed to disclose the firefight which resulted in the death of two soldiers in his asylum application, at his asylum interview (see Exhibit 2, Tab B), and while testifying before the Court on February 11, 2004.

statements in his asylum and adjustment application. He denied any involvement in the gunfight and claimed he did not fire his weapon.

Third, Respondent initially indicated on his asylum application that he was previously arrested. However, he later failed to mention the arrest on his adjustment application, his naturalization application (Govt. Exhibit KK), and even on an application for a liquor license (Govt. Exhibit ZZ). At the February 11, 2004 hearing, Respondent claimed he never attended an adjustment interview, nor was he questioned on any past arrests. However, his prior attorney, Lynn Coyle submitted an affidavit indicating she accompanied him to his adjustment interview. See Resp. Exhibit 9, p. 2. Further, the adjudication officer, Jennifer West, attested that she interviewed Respondent, and indicated she specifically questioned him on his arrest history. See Govt. Exhibit T.

Finally, Respondent testified he attended the PKK camp to learn how to survive in the mountains so he could return to Turkey surreptitiously to engage in protests and propaganda on behalf of the PKK. However, he also claimed he would be in danger if he returned to Turkey. Nevertheless, he still wanted to return to Turkey to accomplish his political goals. Further, Respondent claimed his only way of entering the country in 1988 was by illegally crossing the border from Syria. Although he previously traveled on a false passport in Europe and to Syria, and also upon departing Turkey to come to the United States, Respondent claimed he had to enter the country undetected because if noticed, his "mission" would be in jeopardy.

Lastly, the Court notes Respondent's evasive demeanor at the hearing, and the distinction in his attitude upon questioning by the Service. Based on the foregoing, the Court finds Respondent not to be credible.

B. Willful Misrepresentation of a Material Fact

The Service has charged that Respondent is removable from the United States because when he adjusted his status to that of a lawful permanent resident in 1994 he was inadmissible based on fraud. The Service argues Respondent made three willful misrepresentations of material fact on his I-485 Application for Adjustment of Status: (1) he failed to disclose his association with either the ERNK, ARGK or PKK; (2) he answered "No" to Question 1.b. which asked "Have you ever, in or outside the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?"; and (3) he answered "No" to Question 4 which asked "Have you ever engaged in, conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to, any person or organization that has ever engaged or conspired to engage, in sabotage, kidnapping, political assassination, hijacking, or any other form of terrorist activity?". See Exhibit 2, Tab C. Based on the evidence in the record, the Court agrees.

A fraudulent statement or omission is codified at Section 212(a)(6)(C)(i) of the Act, which provides:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has

> procured) a visa, other documentation, or entry into the United States or other benefit provided under this Act is excludable.

Section 212(a)(6)(C)(i) includes both affirmative statements and nondisclosures. See e.g. Matter of B--, 71 I&N Dec. 465 (BIA 1957) (failure to disclose past membership in communist party constitutes material misrepresentation); Matter of T--, 6 I&N Dec. 136 (BIA 1954) (failure to disclose prior deportation constitutes material misrepresentation). Failure to disclose one's membership in an organization in an immigration application is sufficient to sustain a misrepresentation charge under the immigration laws. See e.g., Matter of G--, 9 I&N Dec. 570 (BIA 1962); Matter of F--, 9 I&N Dec. 627, 631 (BIA 1962); Matter of S-- and B--C--, 9 I&N Dec. 436 (BIA 1961). A representation (or nondisclosure) must be both willful and material to sustain a charge under Section 212(a)(6)(C)(i) of the Act.

Although intent to deceive is not required, a willful misrepresentation must be deliberate and voluntary. See Mwongera v. INS, 187 F.3d 323, 330 (3rd Cir. 1999). Knowledge of the falsity of a representation is sufficient. See Forbes v. INS, 48 F.3d 439, 442 (9th Cir. 1995), Suite v. INS, 594 F.2d 972 (3rd Cir. 1979); see also Matter of Tijam, 22 I&N Dec. 408 (BIA 1998) (concurring & dissenting op.) (noting "a statement constituting a misrepresentation must be made with knowledge of its falsity for it to be considered 'willful' and "[a]lthough a specific intent to deceive is not necessary, an accidental statement or one that is the product of honest mistake is not considered to be a 'willful' misrepresentation"); cf. 9 U.S. Department of

State Foreign Affairs Manual 40.63 n.5.1 (stating that "[t]he term "willfully" as used in [Section] (a)(6)(C)(i) [of the Act] is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought.").

Under the Act, a willful misrepresentation must have been of a "material fact" in order for it to render an alien inadmissible under Section 212(a)(6)(C)(i). A misrepresentation is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded. Matter of S- and B-C-, 9 I&N Dec. 436, 447 (A.G. 1961).

The Court finds Respondent made willful misrepresentations on his I-485 Application for Adjustment of Status. A review of Respondent's pattern of misrepresentations best illustrates his willfulness. The Court notes Respondent's misrepresentations began in 1991 when he presented a fraudulent passport to enter the United States.[21] See Exhibit 2, Tab A, pp. 17-21. Further, his asylum application contained numerous misrepresentations and omissions. See Exhibit 2, Tab A. First, Respondent failed to disclose the gunfight at the Syrian/Turkish bord[illegible]ch led to the death of two

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[21] The use of the false passport is not a basis for the Section 212(a)(6)(C)(i) charge, but rather illustrates a part of an overall pattern of misrepresentations.

soldiers. Second, he made no mention of transporting arms and ammunition into Turkey for PKK use. Third, he stated he was arrested and given a death sentence, but did not indicate the crime with which he was charged. Fourth, he stated he was released from jail because his family paid a bribe to set him free; however, court documents reveal Respondent's conviction was quashed pending the appeal by the prosecutor. See Govt. Exhibit A, p. 38-41. Respondent also submitted a document from Turkey which purportedly stated he was released from prison because the court found there was insufficient evidence. Yet, a correct translation of this document reveals it does not say Respondent was released based on insufficient evidence. See Exhibit 2, Tab E, p. 11. Finally, Respondent claimed he was given a death sentence, but never stated the sentence was ameliorated because of his confession. He also presented a translation of a newspaper article stating he was accused of being a PKK member and faced death by hanging. The translation made no mention of the deaths of two soldiers. However, a full translation of the article reveals Respondent was accused of killing two Turkish soldiers and that he was a high-ranking member of the PKK. See Govt. Exhibit E, pp. 8-9.[22]

To be willful, all that is required is a showing that Respondent knew his statements were false. Forbes, supra at 442. The Court finds Respondent's nondisclosure of his affiliation with the ERNK, ARGK or the PKK was a false statement. Indeed, the

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[22] While Respondent today argues he did not translate these documents, the translations were presented by him. Apparently, they were done by one of the individuals who traveled with him from Turkey.

evidentiary record indicates Respondent was affiliated with the ERNK and PKK. Further, Respondent stated in his asylum application that he "was a leading member of ERNK which had close ties to the PKK." The Court also finds Respondent's answer to Question 1.b. on the I-485 is a willful misrepresentation. The evidentiary record clearly indicates Respondent was arrested and imprisoned in Turkey in 1988. In fact, Respondent disclosed this arrest and several others in his original application for asylum. See Exhibit 2, Tabs A & F. Consequently, the Court finds his nondisclosure of his group affiliation was knowing and intentional, and constituted a willful misrepresentation. The Court also finds his answer of "No" to Question 1.b. on his I-485 to have been knowing and intentional, for Respondent certainly would have known the facts were otherwise.[23] Therefore, it constitutes a willful misrepresentation.

Regarding his answer to Question 4 on the I-485, Respondent denies that he ever engaged in terrorist activity or that he ever performed any action that falls within the ambit of Question 4. However, based on the evidence of record, this Court disagrees. As the Court discusses in Part D below, the objective evidence of Respondent's engagement in terrorist activity is clear and convincing. Given Respondent's inconsistent and incredulous testimony before this Court, his admissions

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[23] The fact that the conviction stemming from Respondent's arrest was later overturned is irrelevant for determining whether Respondent's answer to Question 1.b. on his I-485 constitutes a willful misrepresentation. Question 1.b. is unequivocal in that it asks only whether an applicant has ever been arrested or imprisoned; it does not ask whether the arrest or imprisonment was justified or subsequently led to a conviction.

in his asylum application, the Turkish conviction records, and the background material on the PKK, Respondent clearly knew his statement that he never assisted an organization that engaged in terrorist activity was false. Consequently, the Court finds that when Respondent answered "No" to question 4 on the I-485, he knew the answer was false; therefore, it finds his answer to be a willful misrepresentation.

The Court finds Respondent's misrepresentations were material. First, Respondent would have been excludable on the true facts relating to his assistance and support of the PKK. As the Court discusses below, the evidence of record establishes that Respondent provided material support to the PKK, a terrorist organization. Had he truthfully answered the question relating to whether he had ever assisted an organization that had engaged in terrorist activity, he would have been inadmissible under Section 212(a)(3)(B) of the Act (terrorist activity). Also, on the true facts, Respondent would have been inadmissible because he engaged in the persecution of others. See § 209(b)(3) of the Act.

Second, Respondent's misrepresentations did shut off a relevant line of inquiry which might have resulted in a decision to exclude him. Respondent's negative response to all three questions cut off a line of inquiry that may have resulted in him being found inadmissible on terrorism charges and as a persecutor of others. All three questions which Respondent gave false statements about (affiliation with organizations, arrest, and his assistance to terrorist organizations) directly related to his support of the PKK. Although Respondent claims he previously disclosed all information regarding his affiliation with the ERNK

and arrest in his asylum application, the Court disagrees. Specifically, the Court notes Respondent submitted falsely translated documents which concealed the fact that he was accused of killing two Turkish soldiers and was a high-ranking member of the PKK. As such, the Service did not know the true facts about Respondent's affiliation with the ERNK and the PKK, and about his arrest when granting him asylum in 1992. Accordingly, the Court finds Respondent's misrepresentations on his I-485 did cut off a relevant line of inquiry that might have resulted in a decision to exclude him. Consequently, the Court finds Respondent's misrepresentations meet the test for materiality as stated in Matter of S- and B- C-, supra.

Finally, the Court notes Respondent's assertion that he signed the adjustment application without reading it is without merit. Further, the Court is not persuaded by Respondent's suggestion that he did not have a strong command of the English language when he signed the adjustment application,[24] nor is it persuaded by his excuse that he believed his Turkish arrest was not relevant to his adjustment application. Therefore, the Court finds Respondent's answers on his I-485 were willful misrepresentation of material fact as required by Section 212(a)(6)(C)(i) of the Act. Accordingly, the Court finds the first charge of removability has been sustained.

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[24] Notably, Respondent provided the same responses on his naturalization application. Namely, he failed to disclose his past affiliation with the PKK, and also failed to disclose his arrest in Turkey. See Govt. Exhibit KK. Respondent had a good command of the English language at the time he applied for naturalization, as evidenced by his passing of the citizenship English language test.

C. Persecutor of Others

The Service has charged that Respondent was ineligible for adjustment of status under Section 209(b) of the Act at the time he applied because he was not a refugee as defined under Section 101(a)(42)(A) of the Act. Specifically, it asserts Respondent's support of the PKK, an organization that targets and murders government officials and civilians based on their Turkish nationality, brings him within the definition of a persecutor. The Service also argues Respondent's support of the PKK constituted persecution notwithstanding his claim that his actions were politically motivated. Based on the evidence in the record, the Court finds Respondent was a persecutor of others.

Section 209(b) of the Act requires an alien to remain a "refugee" to be eligible to adjust his status to that of a legal permanent resident. Section 101(a)(42)(A) provides that a person is not a refugee if he has ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. There is no universal definition of persecution. Matter of McMullen, 19 I&N Dec. 90, 95 (BIA 1994). However, "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution." Id. quoting Matter of Laipenieks, 18 I&N Dec. 433 (BIA 1983). Persecution is not "limited to acts committed in an official capacity but is equally applicable to persons who have committed such persecution within the framework of various nongovernmental groupings, whether officially

recognized, clandestine, or self-styled." Matter of McMullen, supra at 97.

A person assists in the persecution of others when his or her action or inaction furthers the persecution in some way. Matter of Rodriquez-Majano, 19 I&N Dec. 811, 814 (BIA 1988). It is the objective effect of an alien's actions which is controlling. Id., citing Laipenieks v. INS, 750 F.2d 1427, 1435 (9th Cir. 1985); Matter of Fedorenko, 19 I&N Dec. 57, 69 (BIA 1984); see also Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981). Participation or assistance need not be on the alien's own volition. Matter of Rodriquez-Majano, supra at 814, citing Fedorenko v. United States, supra.

Personal involvement in the persecution is not necessary to impose responsibility for assisting or participating in persecution. For example, in Maikovskis v. INS, 773 F. 2d 435, 446 (2nd Cir. 1985), the Second Circuit found a police chief who, on orders from the Nazis, ordered his men to arrest all the inhabitants of a village and burn the village to the ground had assisted in the persecution. The personal motivation of the alien for assisting in the persecution was found by the court to be immaterial. Id. In United States v. Dercacz, 530 F. Supp. 1348 (E.D.N.Y. 1982), the court held that a Ukrainian police officer who brought Jews not wearing the appropriate armband to the Gestapo had assisted in persecution even though he never personally inflicted harm on the Jews. In Fedorenko v. United States, supra at 512, the Supreme Court held that a concentration camp guard who was aware that inmates were being murdered had assisted in persecution even though he never participated in the murders. Also, in United States v. Kairys, 782 F.2d 1474 (7th Cir.), cert denied, 476 U.S. 1153 (1986), the

Seventh Circuit held that a concentration camp guard assisted in persecution even though there was no proof that he was personally involved in the atrocities.

The Court finds that Respondent, by his active affiliation and support of the PKK, participated in the persecution of others. A review of Respondent's testimony and the evidence in the record establishes that he aided and assisted the persecution of others as a leading member of the ERNK and PKK. Respondent testified that in May 1988 he attended a PKK training camp to learn how to survive in the mountains so he could return to Turkey surreptitiously to engage in protests and propaganda on behalf of the PKK.[25] He also received military training at the camp, including firearms training. In May 1988, he supported the PKK by helping PKK members attempt to illegally enter Turkey. This event included the firelight between Respondent's six-member unit and the Turkish soldiers at the Syrian/Turkish border. Respondent also illegally transported weapons and ammunition into Turkey. The evidence establishes that Respondent had in his possession a machine gun holding 200 bullets, explosives and grenades when he attempted to cross the border into Turkey in May 1988 with his PKK unit. See Govt. Exhibit A, p. 29. Respondent also successfully smuggled weapons and ammunition into Turkey in June 1988, as group commander of a PKK unit. See Govt. Exhibit A, pp. 31-32. After

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[25] Notably, the Service's expert witness stated that entering Turkey through Syria was a dangerous way to enter the country merely for propaganda purposes. Respondent's assertion that he had no other way to enter the country is questionable, as he previously traveled on a false passport in Europe and Syria, and later from Turkey to the United States.

Respondent's PKK unit entered Turkey, he built depositories to store the weapons and ammunition. See id.[26]

The Court finds Respondent's participation in the illegal shipment of weapons and ammunition into Turkey on behalf of the PKK furthered the PKK's military activities in someway. This activity is virtually identical to the alien's activity in Matter of McMullen, supra, wherein the alien coordinated arms shipments to Northern Ireland on behalf of the terrorist organization PIRA. The Board found the alien engaged in persecution because "[t]hrough those arms shipments [he] directly provided, in part, the instrumentalities with which the PIRA perpetrated its acts of persecution and violence." Id. at 96.

While Respondent claims he cannot be a persecutor because his actions were politically motivated, the Court disagrees. In Matter of McMullen, supra at 97, the Board addressed the issue of the "political offense" exception and held:

> The provision of section 101(a)(42) and 243(h)(2)(A), by excluding from the definition of 'refugee' persons who have participated in the persecution of others, parallel and are consistent with the fundamental principles embodied in the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees. ... This restriction on the scope

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[26] Since the stored weapons and ammunition were removed prior to Respondent's confession to the Turkish authorities, it may be presumed that they remained in the hands of the PKK and its supporters.

> of refugee status applies even though the person so excluded may, in fact, be the subject of persecution and notwithstanding that his persecution of others was politically motivated.

The Board noted the determination of whether crimes are of a political character is a question of fact. McMullen, supra (citing Omelas v. Ruiz, 161 U.S. 502 (1896)). In evaluating the political nature of a crime, the political aspect of the offense should outweigh its common-law character. Id. at 97-98. Specifically, "[t]his would be the case if the crime is grossly out of proportion to the political objective or it if involves acts of an atrocious nature." Id. at 98.

In McMullen, supra, the Board stated the alien's "involvement in the terrorist use of explosives and his participation in the PIRA's campaign of violence randomly directed against civilians represent[ed] acts of an atrocious nature out of proportion to the political goal of achieving a unified Ireland and [were] not, therefore, within the political offense exception." Further, it found the civilian status of the victims a significant factor in evaluating the applicability of the political offense exception. Id. The Board concluded by finding the PIRA organization's involvement in violent acts directed against civilians took the actions outside the political offense exception. Id.

In the instant case, the Court finds Respondent's activities in the PKK do not fall within the political offense exception. Specifically, the Court finds the PKK's activities were not legitimate military actions directed toward the overthrow of the government. Rather, the PKK "targeted individuals based on their public opposition to the organization and its terrorist

activities." McMullen, supra at 96. This is evident from the PKK's reaction to the Turkish government setting up the "village guard" system to protect civilians in the Turkish mountains from PKK terrorist attacks. As documented in material collected by the Foreign Terrorist Tracking Task Force:

> As soon as the village guard system was established, the PKK turned its full attention to these para-military forces with the goal of preventing recruitment to them. As of 1985, more and more attacks were thus recorded against "civilians". Those killed, including Kurdish infants and women, were related to the village guards. The message was that any family "**who dealt with the state**" would be destroyed.
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> * * *
>
> In 1988 and 1989 the situation was similar. Militants of the PKK, then in its growing period, raided one village after another, **killing women and children** and explaining these attacks as offensives against village guards. Many hundreds of civilians were killed in this campaign, which frustrated state officials and security forces. (Emphasis added).[27]

See Exhibit 2, Tab I, p. 7.[28]

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[27] It is significant to note that the time periods referenced herein relate to the period when Respondent attempted to and entered Turkey.

[28] This report is consistent with the testimony of the Service's expert witness who stated the PKK routinely targeted small villages and killed Kurdish village guards and their families. He also testified that teachers, including Kurdish teachers, were

Indeed, the PKK attacks on the village guard system is the equivalent of the PIRA's use of violence against those opposed to its organization and activities. See McMullen, supra at 96. Although Respondent compares his activities to those in Matter of Rodriquez-Majano, 19 I&N Dec. 811 (BIA 1988), the Court is unpersuaded by this assertion. In Matter of Rodriquez-Majano, the Board held that military actions in the context of a civil war are actions beyond the limits of the term "persecution." Id. However, the Board in Matter of McMullen, supra at 96, equally held that terrorist activity which targets individuals based on their public opposition to the organization and its terrorist activities amounts to persecution of others.

The Court notes the PKK's activities (terrorist) were considerably different from the guerilla activities (civil war) at issue in Rodriquez-Majano. Moreover, Respondent's involvement with the PKK greatly differed from Rodriquez-Majano's involvement with the guerillas in El Salvador. Unlike Respondent, the alien in Rodriquez-Majano was forced to join the guerillas. Further, he took steps at every stage of his involvement with the guerillas to desert the group. Respondent, on the other hand, was a group leader of the PKK.[29] See Govt. Exhibit A, p. 31. Moreover, he voluntarily entered the PKK training camp, where he received firearms training. Also, he led a six-member unit across the Syrian/Turkish border, and illegally transported arms and ammunition into Turkey for

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targeted and killed by the PKK. These killings were documented by the Turkish Ministry of Education in an "Album of Teachers Massacred by the Terrorist." See Govt. Exhibit HH.

[29] Respondent in fact testified he actively dissuaded a member of his group from deserting the group.

PKK use. Finally, Respondent testified at his individual hearing that he still supports the PKK' s cause.

Based on the evidence in the record, the Court finds Respondent provided material support to the PKK, an organization which murdered individuals, both governmental officials and civilians, based on their Turkish nationality. Accordingly, the Court finds Respondent engaged in persecution and therefore was not admissible to the United States when he adjusted his status to that of a lawful permanent resident. As such, the Court sustains second charge of removability.

D. Aggravated Felony

1. Finality of Conviction

The Service has charged that Respondent is removable pursuant to Section 237(a)(2)(A)(ii) of the Act for having been convicted of an aggravated felony, to wit: murder and a crime of violence. Section 237(a)(2)(A)(iii) of the Act renders an alien removable for a conviction of an aggravated felony "after admission." While the Service argues Respondent was not "convicted" until 2004, Respondent claims his conviction occurred before his admission to the United States. Specifically, Respondent claims he was convicted in 1990 when the State Security Court found him guilty of violating Article 125 of the Turkish Penal Code (committing actions towards the separation of Turkey). For the reasons set forth below, the Court finds Respondent has been convicted of an aggravated felony "after admission."

The immigration laws of the United States mandate that a conviction does not exist for immigration purposes until the criminal case becomes "final." Will v. INS, 447 F.2d 529, 532 (7th Cir. 1971) (requiring "that

a final curtain must have been drawn in the criminal proceedings."). For instance, the Sixth Circuit recently held in United States v. Garcia-Echaverria, 374 F.3d 440, 445 (6th Cir. 2004), a conviction must be final to support an order of deportation and finality requires the defendant to have been sentenced and to have exhausted or waived his rights to direct appeal. The finality requirement is also consistent with Congress' definition of "conviction" for immigration purposes. Section 101(a)(48)(A) of the Act provides:

> The term "conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In the instant case, Respondent was convicted on March 19, 1990, and was sentenced to 4 years, 2 months imprisonment. Subsequently, the prosecutor appealed the decision believing the trial court improperly reduced Respondent's sentence.[30] Under Article 294 of the Turkish code of Criminal Procedure, an appeal by the prosecutor may result in a judgment being changed "in favor of the accused." See Govt Exhibits G, p. 26,

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[30] Respondent initially received a life sentence which was later reduced to 4 years, 2 months imprisonment, as he invoked the "code of confession" and cooperated with the Turkish government.

and GG, p. 99. On April 8, 1991, the Turkish appeals court (Court of Cassation) quashed the State Security Court's decision, upholding the prosecutor's appeal. Later, on March 16, 2004, the State Security Court re-sentenced Respondent to 6 years imprisonment for violating Article 125 of the Turkish Penal Code.

In determining when Respondent's conviction became final, the Court must address the re-sentencing impact on the finality of the conviction. The Board has found that alterations in sentencing do affect finality and substantially alter the conviction for immigration purposes. See Matter of Song, 23 I&N Dec. 173 (2001) (where the sentence was vacated and reduced to less than one year, the conviction could not stand as an aggravated felony); Matter of Martin, 18 I&N Dec. 226, 227 (1982) (where respondent re-sentenced under rules providing for re-sentencing due to illegal sentence (i.e., correction), the new reduced sentence found to be the only valid and lawful sentence). These decisions support the position that a re-sentencing does affect the finality of the decision. Here, while the new sentence does not favorably affect the immigration consequences, there is no doubt the "final" sentence was not imposed until 2004.

The Court finds Respondent's 1990 conviction was not final. The Court notes Respondent had no expectation in the finality of his 1990 sentence. See U.S. v. Rodriguez, 112 F.3d 26 (1997) (defendant had no reasonable reliance on the finality of his conviction where the court modified his sentences on 4 drug counts, re-sentencing him after a firearms conviction was vacated). Specifically, the appeal of the sentence and the documents Respondent presented show the sentence entered by the presiding court was "quashed"

pending the prosecutor's appeal. Moreover, the case was remanded for further proceedings. As such, Respondent's conviction was not final until the prosecutor's appeal was resolved. In 2004, Respondent was finally re-sentenced when the prosecutor's direct appeal of the State Security Court's sentence was resolved. Accordingly, Respondent was not "convicted" for immigration purposes until 2004.

2. Crime of Violence

Section 101(a)(43)(F) of the Act defines an "aggravated felony" as "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least 1 year." Pursuant to 18 U.S.C. § 16, the term "crime of violence" means:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[31]

In determining whether an offense is a "crime of violence" under this definition, the focus is on whether the commission of the crime would ordinarily present a risk that physical force would be used against a person or property, given the nature of the crime. In re Palacios, 22 I&N Dec. 434, 436 (BIA 1998).

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[31] 18 U.S.C. § 16(b) applied to Respondent's case because Article 125 of the Turkish Penal Code is a felony. See Govt. Exhibit F, pp. 49-51 (Turkish Criminal Code).

Respondent's conviction for violating Article 125 of the Turkish Penal Code (committing actions towards the separation of Turkey) is a crime of violence. Article 125 of the Turkish Penal Code provides:

> ARTICLE 125: Person committing an action directed towards the transfer of all or part of the state territory to the sovereignty of another state, or diminishing of the independence of the state, or jeopardizing the unity of the state, or secession of some part of the territory under state sovereignty; should be punished with heavy imprisonment.

See Govt. Exhibits B, p. 4, and F, p. 51.

Generally, the underlying facts of a conviction are not relevant. The court looks only to whether the generic nature of the offense is an aggravated felony. Matter of Alcantar, 20 I&N Dec. 801, 812 (BIA 1994). When the conviction is under a statute that is divisible, it is necessary to look to the record of conviction (not the facts) "and to other documents admissible as evidence in proving a criminal conviction" to determine whether the specific offense will sustain an aggravated felony charge. Matter of Sweetser, 22 I&N Dec. 709, 714 (BIA 1999). The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from court proceedings. See, e.g., Matter of Rodriquez-Corets, 20 I&N Dec. 587, 588 (BIA 1992); Matter of Short, 20 I&N Dec. 136, 137-138 (BIA 1989) (including indictment, plea, verdict, and sentence in "record of conviction"); Matter of Esfanidiary, 16 I&N Dec. 659, 661 (BIA 1979) (including charge or indictment, plea, judgment or verdict, and sentence in "record of conviction").

The Court finds Article 125 is not divisible, in that the crime of overturning the sovereignty of Turkey unquestionably involves a substantial risk that physical force may be used against a person or property during its commission. Even if the Court were to determine that Article 125 is divisible, an examination of the Turkish conviction records ends the inquiry as to whether Respondent was convicted of a crime of violence. The "Grounded Judgment" sets forth the offense for which Respondent was convicted and establishes that physical force was used by Respondent in committing the offenses:

> Offense: Committing actions directed towards separation of a part of the territory of the State (namely killing man, being member of the organization PKK, and serving as administrator).

See Govt. Exhibit A, pp. 6-7. Further, the Indictment spells out the details:

> [T]he accused Ibrahim Parlak committed a number of actions inside the organization called PKK, that he experienced military and political training courses at the Camp "Helve", that after having completed this training program, he took part in killing two soldiers by a group of terrorists, while they were entering Turkey through border...

See Govt. Exhibit A, p. 7-8. Based on the judgment of conviction, Respondent has indisputably been convicted of a crime of violence.

While Respondent argues his conviction was a purely political offense, excluding it from the definition of crime of violence in Section 101(a)(43)(F) of the Act,

the Court disagrees. The determination of whether a conviction is based on political grounds is an exception to the rule that the immigration court cannot look behind the conviction records. Matter of Adamo, 10 I&N Dec. 593, 596 (BIA 1964). However, the inquiry can only be made if the conviction documents on their face indicate the conviction was a political offense. Id.

The Court notes there is no indication from the face of Respondent's conviction records that his conviction was for political grounds, rather than for a criminal offense. Respondent's conviction records indicate he was convicted of violating Article 125 of the Turkish Criminal Code, taking actions to overthrow the Turkish government. See Govt. Exhibits A, p. 39, and F, p. 51. This offense is a criminal offense codified in the Turkish Penal Code under the Chapter entitled "Felonies Against the State." See Govt. Exhibit F, pp. 51-60. Although Turkey defines Respondent's conviction as a criminal offense, the Court is not bound by the foreign categorization of the offense. See, e.g., Toutotmjian v. INS, 959 F. Supp. 598, 602 (W.D.N.Y. 1997). Rather, the Court has fully considered whether Respondent's offense amounted to a purely political offense based on the relevant rules established by the BIA and United States courts.

The Board has addressed the "purely political offense" issue in only one case, Matter of K, 4 I&N Dec. 108 (BIA 1950). In that case, the Board considered the "purely political offense" exception for crimes involving moral turpitude, and concluded that the political offense definition in extradition cases should be used as a guide in immigration cases. Id. at 110. The Board has also addressed the political offense exception in the context of asylum and withholding of removal. The

seminal case addressing that issue is Matter of McMullen, 19 I&N Dec. 90 (BIA 1994). The Board in McMullen similarly used the extradition definition of "political offense" as a guide. Id. at 98-99. However, the Board rejected the strict extradition definition of "political offense" born out of the English common law which invokes the exception anytime a crime is committed in furtherance of a political uprising, movement or rebellion. Instead, the Board used a balancing approach. Under this approach, the court first determined if there is a casual link between the crime committed and its alleged political purpose. That link, if established, is then balanced against the means by which the group or individual commonly uses to achieve those goals. If the group or individual uses atrocious means to achieve its goals, for instance targeting civilians, the crime committed is deemed to fall outside the "political offense" exception.

The Board is not required to consider the "atrocious nature" of the offense if it has determined that the common-law (i.e., criminal) aspect of the offense outweighs the political nature of the crime. INS v. Aguirre-Aguirre, 526 U.S. 415, 429-430 (1999). "For this reason, the BIA need not give express consideration to the atrociousness of the alien's acts in every case before determining that an alien has committed a serious nonpolitical crime. Id. at 430. The Supreme Court stated the rule another way: "Even in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical." Id. at 432. The Supreme Court explained the reason for this rule:

> As a practical matter, if atrocious acts were deemed a necessary element of all serious

> nonpolitical crimes, the Attorney General would have severe restrictions upon her power to deport aliens who had engaged in serious, though not atrocious, forms of criminal activity.

Aguirre-Aguirre, supra at 430.

The Court finds the means the PKK used to achieve its purported political goals were outrageously out of balance. A review of the conviction record and the background evidence establishes that Respondent's conviction stemmed from his involvement with fellow PKK members in the illegal shipment of arms and ammunition into Turkey on behalf of the PKK, which resulted in the death of two Turkish soldiers. See Govt. Exhibit A, pp. 31-37. The background evidence indisputably establishes that the PKK engaged in atrocious terrorist attacks against civilians in Turkey during Respondent's association with that group (1985-1991). For example, the Human Rights Watch World Report for 1990 states:

> The PKK has been waging a guerilla war in southeast Turkey since 1984. About 2,000 have died in that time at the hands of security forces and the PKK, **over a third of them villagers .... The PKK also continues to inflict casualties on civilians**.

See Exhibit 2, Tab A, pp. 39-40 (emphasis added).

The PKK's attacks on civilians increased in 1985, as reported in material collected by the FBI Foreign Terrorist Tracking Task Force ("Task Force Report"):

> As soon as the village guard system was established, the PKK turned its full attention to these paramilitary forces with the goal of preventing recruitment to them.

> As of 1985, more and more attacks were thus recorded against "**civilians**". **Those killed, including Kurdish infants and woman**, were related to the village guards. The message was that any family "who dealt with the state" would be destroyed.

See Exhibit 2, Tab I, p. 7 (emphasis added).

Moreover, in the late 1980s the PKK slaughtered entire civilian villages:

> By 1987, the PKK had managed to get better organized and had recruited thousands of sympathizers. It had created a popular front, which gathered and organized non-Marxist Kurdish peasants and so-called people's army, which trained full time fighters or the movement "mountain units". That year the PKK **attacked many Kurdish villages** in the Southeast declaring them as "state collaborators."
>
> In 1988 and 1989 the situation was similar. Militants of the PKK, then in its growing period, raided one village after another, **killing women and children** and explaining these attacks as offensives against village guards. **Many hundreds of civilians were killed** in this campaign, which frustrated state officials and security forces.

See id. (emphasis added).

The Turkish Ministry of Foreign Affairs summarized civilian deaths caused by PKK terrorist attacks and documented 978 civilian deaths from the years 1984 to 1991. See Govt. Exhibit P, p. 7. Finally, the Turkish Ministry of Education listed 22 teachers

who were murdered by the PKK from 1980 through 1991. See Govt. Exhibit HH, pp. 1-30. This publication lists over one hundred other teachers murdered by the PKK from 1991 through 1996. Id., pp. 31-133.

A review of the background materials reveal the PKK's activities were not legitimate acts directed to disrupt the political structure of Turkey, but were acts of social violence, such as killing civilians, directed to destroy the social structure of Turkey in favor of the Kurds. The Board in McMullen made clear that such activity does not form the basis of a valid political offense defense:

> The definition of 'political disturbance,' with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger 'political' objective of the person who sets off the bomb may be to eliminate the civilian population of a country....

McMullen, supra at 99 (citing Eain v. Wilkes, 641 F.2d 504, 520-21 (7th Cir. 1981)).

Finally, the Court is disinclined to utilize the State Department's definition of the term "purely political offense,"[32] as Respondent has suggested. Pursuant to the former and current Section 103 of the Act, the Secretary of Homeland Security is charged with the administration and enforcement of the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens, provided that the determination of questions of law by the Attorney General shall be controlling. Further, an Immigration Judge and the Board must give full force and effect of law to the regulations promulgated by the Attorney General and the Department of Homeland Security. Matter of Fede, 20 I&N Dec. 35 (BIA 1989); 8 C.F.R. § 2.1. There is no similar provision in the Act or Title 8 of the regulations relating to the effect in the regulations of the State Department. Accordingly, the Court is not bound by the State Department regulations.

Even if this Court were to apply the State Department's definition of a "purely political offense" it would find Respondent's conviction falls outside that definition. Over the course of this proceeding, Respondent has provided no evidence establishing that the criminal charges in Turkey were fabricated. Indeed, the evidence revealed that Respondent confessed to the crime and cooperated with the

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[32] The State Department's definition states:

(6) *Political offenses.* The term "purely political offense" as used in INA 212(a)(2)(i)(I), includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.

22 C.F.R. § 40.22(6).

government in return for a dramatically reduced sentence. See Govt. Exhibit A. Respondent never claimed the charges were fabricated. He did not mention fabricated charges in his asylum application (Exhibit 2, Tab A); nor did he mention it to the FBI (Exhibit 5), or to the Court. Respondent's only claim to the Court is that he did not engage in all of the acts set forth in the conviction record (i.e., pull the trigger that killed the soldier). He never disputed that he was present when the soldiers were killed, nor did he dispute that he had a grenade in his possession at the time. Further, there is no evidence that the charges were predicated upon repressive measures against racial, religious, or political minorities. Charges were brought because two soldiers were killed.

In conclusion, the Court finds Respondent's conviction does not meet the political offense exception as set forth in Aguirre-Aguirre, supra and McMullen, supra. Further, the conviction does not fall within the State Department's definition of a "political offense."

3. Murder

The Service has also charged that Respondent is removable from the United States because he has been convicted of an aggravated felony; namely, murder pursuant to Section 101(a)(43)(A) of the Act. Although Respondent claims he has not been convicted of an aggravated felony because the word "murder" does not appear in Article 125 of the Turkish Penal Code, the Court finds his argument is without merit.

The Court notes Article 125 is divisible on the charge of murder. Accordingly, a review of the record of conviction is necessary to determine whether the specific offense Respondent was convicted of involved murder. See Matter of Sweetser, 22 I&N Dec. 709

(BIA 1999). The Grounded Judgment, which sets forth the offense for which Respondent was convicted, states:

> Offense: Committing actions directed towards separation of a part of the territory of the State (namely killing man, being member of the organization PKK, and serving as administrator).

See Govt. Exhibit A, pp. 6-7. Similarly, the Indictment states:

> [T]he accused Ibrahim Parlak committed a number of actions inside the organization called PKK, that he experienced military and political training courses at the Camp "Helve", that after having completed this training program, he took part in killing two soldiers by a group of terrorists, while they were entering Turkey through border.

See Govt. Exhibit A, pp. 7-8. Finally, the State Security Court specifically found:

> [t]he accused [Respondent] in the direction towards objectives of this organization [the PKK], on 21.05.1988 in night, in course of entering the Turkish territory, got in touch with security forces and fighting, after which gendarme soldiers Dincer Demir and Serif Kaya were died, as a result of participating in this fighting with his gun, **thus committing the offense, imputed to him.**

See Govt. Exhibit A, pp. 37-38 (emphasis added).

While Respondent did not fire the pistol which caused the deaths of the two Turkish soldiers, he is still accountable for the killings. Specifically, the offense

must be imputed to him as Respondent was the leader of a group engaging in illegal activity. More specifically, the group he led engaged in the illegal smuggling of arms and weapons across the Syrian/Turkish border in violation of Turkish laws. Further, the conviction record indicates that PKK members present in Respondent's unit fired their weapons at the soldiers. See Govt. Exhibit A, pp. 30. Accordingly, Respondent was charged with a felony under Turkish law. Respondent's conviction relating to the death of two soldiers is analogous to a felony-murder offense. Under the felony-murder statute, killing is done with malice aforethought if it results from the perpetration of, or attempted perpetration of a felony.[33] Thus, if a death resulted from the commission or attempted commission of a felony, the killing is murder. The effect of such statute is to impute malice to a felon even though he had no intent to kill.

Based on the record of conviction, the Court finds Respondent's offense involved murder. Namely, the offense of killing the two soldiers has been imputed to Respondent as leader of a PKK unit engaged in illegal activity. Accordingly, the Court sustains both aggravated felony charges against Respondent.

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[33] 18 U.S.C. § 1111(a) defines murder as:

[t]he unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; **or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery** ... is murder in the first degree. (Emphasis added).

E. Terrorism Charges

The Service has charged that Respondent is removable from the United States under Section 237(a)(4)(B) of the Act as a person who has "engaged in terrorist activity," as that term is defined in Section 212(a)(3)(B)(iv) of the Act. Section 212(a)(3)(B)(iv) states that "engaged in terrorist activity" means, among other things:

> (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a **terrorist activity** (emphasis added);
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> * * *
>
> (IV) to solicit funds or other things of value for—
>
> > (cc) a terrorist organization described in clause (vi)(III),[34] unless the solicitor can demonstrate that he did not know, and should not have known, that the solicitation would further the organization's **terrorist activity** (emphasis added);
> >
> > * * *
>
> (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds,

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[34] Section 212(a)(3)(B)(vi)(III) includes "a group of two or more individuals, whether organization or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv) [of Section 212(a)(3)(B)]." There is no requirement that the organization be designated a "terrorist organization." See Daneshvar v. Ashcroft, 355 F.3d 615, 627-628 (6th Cir. 2004).

transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a **terrorist activity** (emphasis added);

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a **terrorist activity** (emphasis added);

* * *

(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's **terrorist activity** (emphasis added). This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.

Section 212(a)(3)(B)(iii)(IV) describes "terrorist activity" to include assassination. Section 212(a)(3)(B)(iii)(V)(b) describes a "terrorist activity" to include ...

> the use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

Based on the evidence in the record, specifically, Respondent's asylum application, his testimony before the Court, the Turkish conviction records, and the background material on the PKK, the Court finds Respondent has "engaged in terrorist activity" within the meaning of Sections 212(a)(3)(B)(iv)(I) (commit or incite to commit terrorist activity), 212(a)(3)(B)(iv)(VI)(aa), (bb) and (dd) (material support to terrorist activity), and 212(a)(3)(B)(iv)(IV)(cc) (solicitation of funds) of the Act.

1. **Subsection (I) (commit or incite to commit terrorist activity)**

The March 16, 2004, decision of the State Security Court convicting Respondent of violating Article 125 of the Turkish Criminal Code (committing actions directed towards separation of Turkey) irrefutably establishes Respondent engaged in terrorist activity under Section 212(a)(B)(3)(B)(iv)(I). Namely, Respondent participated in the killing of two Turkish soldiers by means of a gun and a grenade at the Syrian/Turkish border on his way back to Turkey after attending a PKK training camp in Lebanon.[35] The evidence presented to the State Security Court was overwhelming.

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[35] Use of a firearm or grenade fall within "use of any explosive, firearm ..." referenced in the definition of "terrorist activity" in Section 212(a)(3)(iii)(B)(V)(b)'s definition of "terrorist activity".

The State Security Court, in its factual findings, specifically found Respondent engaged in the gun fight that led to the death of the two soldiers. See Govt. Exhibit A, p. 30-31. Further, Respondent dropped a grenade at the location where the soldiers were stationed. In Respondent's statement to the prosecutor on November 25, 1988, he admitted he dropped a grenade during the conflict. Id., p. 19. He reiterated this fact before the State Security Court at his trial. Id., p. 20. He further told the Security Court that this conduct was in line with the PKK guerilla handbook. Id. p. 21. Not surprisingly, the State Security Court found that Respondent dropped the grenade. Id., p. 31.

The State Security Court held that Respondent, based on these events, participated in the murder of the two soldiers:

> The accused, in the direction towards objectives of this organization on 21.05.1988 in night, in course of entering the Turkish territory, got in touch with security forces and fighting, after which gendarme soldiers Dincer Demir and Serif Kaya were died, as a result of participation in this fighting with his gun, thus committing the offence, **imputed to him.** (Emphasis added).

See Govt. Exhibit A, pp. 37-38. Further, the "Grounded Judgment clearly set forth the offense for which Respondent was convicted:

> Offense: Committing actions directed towards separation of a part of the territory of the State (namely killing man, being member of the organization PKK, and serving as administrator).

See Govt. Exhibit A, pp. 6-7.

While Respondent argues there is no evidence establishing that he *intended* "to endanger, directly or indirectly, the safety of" the two soldiers, the Court finds his argument on the "intent" issue is without merit. Further, the Court notes that even though the bullets that killed the two Turkish soldiers did not come from Respondent's gun, he is still held accountable for the killings.

First, the State Security Court held Respondent responsible for the murder of the two soldiers as an accessory to the trigger-puller. See Govt. Exhibit SS, pp. 22-23; Govt. Exhibit A, pp. 37-38. Under federal law, an accessory (someone who aids the principal) is held responsible to the same extent as the principal (trigger-puller). See United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177-178 (6th Cir. 1992); United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976) (explaining that "one who causes another to commit an unlawful act is as guilty of the substantive offense as the one who actually commits the act"). Moreover, Congress abolished the common law distinction between principals and accessories with the enactment of 18 U.S.C. § 2 (aiding and abetting).[32] To be guilty of aiding and abetting a defendant must "in some sort associate himself with the venture, that he participate in it as something **he wishes to bring about**, that he seek by his action to make it succeed." Superior Growers Supply, Inc., supra at 177-78,

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[32] Aiding and abetting under 18 U.S.C. § 2 is not a separate crime. Rather, it recognizes that an accessory is held responsible as a principal. United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177-178 (6th Cir. 1992).

quoting United States v. Peoni, 100 F2d. 401, 402 (2nd Cir. 1938) (emphasis added).

Accordingly, because Respondent participated with the trigger-puller with the desire to bring out the shooting, he clearly used "an explosive, firearm, or other weapon or dangerous device ... with intent to endanger ..." pursuant to Section 212(a)(3)(B)(iii)(V)(b) of the Act.

Respondent is also held responsible for using "an explosive, firearm, or other weapon or dangerous device ..., with intent to endanger ...", even though he was not the trigger-puller, under the *Pinkerton doctrine*, established by the United States Supreme Court in Pinkerton v. United States, 328 U.S. 640 (1946). Under the *Pinkerton doctrine* a coconspirator is held responsible for the foreseeable **substantive** offenses of other co-conspirators (in addition to being liable on a conspiracy charge) done in furtherance of the conspiracy. 328 U.S. at 646-47; United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (holding that a conspirator may be convicted for offenses committed by other conspirators during and in furtherance of the conspiracy under the vicarious liability rule established in Pinkerton).

In Pinkerton, the Supreme Court held that the crime of conspiracy does not merge into the completed substantive offense, and, thus, the foreseeable crimes committed by a conspirator in the furtherance of the conspiracy may be imputed to the other co-conspirators. Id. at 647-48 (holding that co-conspirators are held accountable for all "ramifications of the plan which could | | be reasonably foreseen"). The Court reasoned that the overt act of one co-conspirator is imputed to the other co-conspirators

because each conspirator is in essence the agent of the other. Id. at 646-47. Thus, a "court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy." United States v. Gallo, 763 F.2d 1504, 1520 n.22 (6th Cir. 1985), quoting United States v. Alvrez, 755 F.2d 830, 849-50 (11th Cir. 1985); see e.g. United States v. Williams, 894 F.2d 208, 211 (6th Cir. 1990) (finding that "the act of possessing a firearm is attributable to a co-conspirator not present at the commission of the offense as long as it constitutes reasonably foreseeable conduct"). "The criminal **intent** to do the act is established by the formation of the conspiracy." Id. at 647 (emphasis added). Moreover, one conspirator need not even know about the acts of another to be held responsible for them. United States v. Davis, 809 F.2d 1194, 1203 (6th Cir. 1987). The "*Pinkerton* rule is alive and well in [the Sixth] Circuit." United States v. Myers, 102 F.3d 227, 238 (6th Cir. 1996).

A conspiracy only requires an agreement to commit an unlawful act and an overt act in furtherance of the conspiracy. United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). The agreement need not be a formal agreement. Id. Rather, the existence of a conspiracy may be inferred from acts done in furtherance of a common purpose. Id. quoting United States v. Ayotte, 741 F.2d 865 (6th Cir. 1984).

The evidence clearly establishes that Respondent entered into a conspiracy with fellow PKK members, and others, to illegally enter Turkey. Part of this agreement was the formation of a plan how the group would respond if it encountered an armed conflict with the Turkish government. Since they would most likely

encounter opposition, discussions were held as to who would shoot and who would carry unloaded weapons. Thus, there can be no dispute that the death of the two Turkish soldiers was a *reasonably foreseeable* consequence of the conspiracy.

The conspiracy unfolded as follows. After Respondent undertook military and guerilla training for 11 months at a PKK camp in Lebanon, he formed a group, himself as group commander, with fellow camp attendees called "Revenge Group of Sinan Cemgil" for the purpose of illegally entering Turkey. See Govt. Exhibit A, p. 28; Govt. Exhibit SS, p. 9-10, 21. This group was also designated Govt. Exhibit SS, p. 10, 21. Respondent's group had planned to meet with two of the cell groups after entering Turkey. Id.; Govt. Exhibit A, p. 20.

During the preparation stage of the conspiracy, just prior to departing for Turkey, Respondent and his group met with the PKK leader, Abdullah Ocalan. See Govt. Exhibit A, p. 28; Govt. Exhibit SS, pp. 10, 18-19. Respondent and his co-conspirators were given fake identification, money, provisions for seven days, PKK propaganda material, machine guns, ammunition, explosives, grenades, fuses and caps. See Govt. Exhibit A, p. 28; Govt. Exhibit SS, p. 10, 12, 18-19. One co-conspirator was even given a rocket launcher with six rockets. See Govt. Exhibit SS, pp. 11-12, 19. Next, Respondent's group formed an alliance with Syrian guides and Turkish smugglers to aid their surreptitious entry into Turkey. See Govt. Exhibit SS, p. 10-13; Govt. Exhibit A, pp. 29-30. These guides and smugglers were also armed. See Govt. Exhibit SS, pp. 10-13; Govt. Exhibit A, p. 30. Respondent's group was joined by one additional PKK member, code name

CEMAL, just before the group reached the Syrian/Turkish border. See Govt. Exhibit SS, p. 19.

The new alliance entered Turkey as follows: the guides, smugglers and CEMAL led the group (with bullets chambered in their weapons). See Govt. Exhibit A, pp. 29-30; Govt. Exhibit SS, p. 13. Respondent's group of six followed. See Govt. Exhibit SS, p. 13. The first two members in Respondent's group (in front) had bullets chambered in their weapons. Id. The remaining four members, including Respondent, did not chamber bullets in their weapons to avoid shooting their fellow group members. Id. at 13-14; Govt. Exhibit A, p. 30. This manner of entry was consistent with PKK's handbook on guerilla warfare. See Govt. Exhibit A, p. 21; Govt. Exhibit SS, p. 16.

The group as a whole (Respondent's group, CEMAL, and the guides and smugglers) specifically agreed upon a plan how to respond if they engaged in armed conflict with the Turkish government. Namely, those in the front would open fire and those in the back would retreat. See Govt. Exhibit A, pp. 17, 30-31; Govt. Exhibit SS, pp. 13, 14-15, 19, 22. As set forth in the Turkish conviction records:

> Prior to appearing at that location [at the Syrian/Turkish border] they determined the mamier of action if there would occur any armed conflict. Accordingly, in case of occurrence of any conflict ahead leading two persons, and in case of any conflict on back side, Murat Karayilan, Syrian person and contrabandist would be opening fire, whereas the whole group would recede and 4 persons in the mid part would not be using any arms.

See Govt. Exhibit A, p. 17.

A gun fight did ensue and the group acted exactly as planned, individuals in the front opened fire and those in the back retreated into Syria. See Govt. Exhibit A, pp. 17-18; Govt. Exhibit SS, pp. 13, 19, 22. Panic soon overtook the group where all group members, including Respondent, randomly opened fire; Respondent also dropped a grenade. See Govt. Exhibit A, pp. 17-18; Govt. Exhibit SS, pp. 13, 19, 22. While Respondent's group was retreating into Syria one of his group members took a gun from one of the dead soldiers. See Govt. Exhibit A, p. 30-31; Govt. Exhibit SS, pp. 16, 19. The official findings of the State Security Court describe what occurred:

> **As they previously agreed with each other,** leading persons [those in the front] filled their bullets into guns, but following persons [those in the rear] didn't do so, so that they couldn't open catastrophically any fire towards leading persons [those in the front]. At the time of passing through border line, they saw a crew of two soldiers walking along the border line. So, they laid down on the ground. But one of the soldiers realized that the wire fence was cut off. At that time some guns were fired. According to previous agreement, namely Murat Karayilan, Syrian citizens and contrabandists, and Ali Omurcan and Ibo (C) were opening fire.
>
> Later all members of the group with panic stress began to open fire in non-targeted manner. At that time the accused [Respondent] also opened fire on both sides. Upon the soldiers have fallen down on the ground, members of the group began to run

> back in a panic manner. The accused Ibrahim Parlak, who was following the group at the very back position, returned at first position, being followed by other members of the group. While coming back Ali Omurcan was taking on himself a gun of soldiers, thus the group entered the inner land of Syrian territory. In course of this event the accused Ibrahim Parlak dropped a grenade, and Bektaas Yuksel—a cartridge, on the location of the event.

See Govt Exhibit A, pp. 30-31 (emphasis added).[33]

In addition to the Turkish criminal records, Respondent's admissions in his asylum application supports the conclusion that he "engaged in terrorist activity" as that term is defined in section 212(a)(3)(B)(iv)(I). Respondent admitted in his asylum application that he engaged in a firefight at the Syrian/Turkish border. See Exhibit 2, Tab A, pp. 9-10. Further, a newspaper article he submitted in support of his asylum application indicated that he was involved in this firefight and that it resulted in the death of two Turkish soldiers. Id, p. 8.[34]

Based on this evidence, the Court finds that the death of the two Turkish soldiers was a *reasonably foreseeable* consequence of the conspiracy. The Court notes the specific agreement between the conspirators

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[33] The above events that transpired at the Syrian/Turkish border were corroborated by two of Parlak's co-conspirators. See Govt. Exhibit SS, p. 22.

[34] Respondent's denial of his involvement in this gun fight at his individual hearings is unpersuasive because it directly contradicts his asylum application (which was signed under oath) and the Turkish conviction records.

on how they would react upon encountering an armed conflict with the Turkish government. Therefore, on the issue whether Respondent "use[d] ... any explosive, firearm, or other weapon or dangerous device ... with intent to endanger ..." it is irrelevant that Respondent's bullet did not kill one of the soldiers because under the *Pinkerton doctrine* he is held criminally responsible for the actions of his co-conspirators, the trigger-pullers.[35] Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). As such, the "intent" requirement of Section 212(a)(3)(B)(iii)(V)(b) "is established by the formation of the conspiracy." Id. at 647.

Not only did Respondent commit a "**terrorist activity**" by using "an explosive, firearm, or other weapon or dangerous device ..., with intent to endanger ..." pursuant to Section 212(a)(3)(B)(iii)(V)(b), he also conspired to do such, which, itself, constitutes "**terrorist activity**" under Section 212(a)(3)(B)(iii)(VI) of the Act (defining "**terrorist activity**" to include a "threat, attempt, or conspiracy to [engage in terrorist activity]").

A person is guilty of conspiracy upon the agreement to commit an unlawful act and an overt act in furtherance of the agreement. United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). It is irrelevant whether the substantive crime (the object of the conspiracy) is ever committed. Id. The essence of a

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[35] It is also not necessary to identify which coconspirator killed the soldiers. See Pinkerton v. United States, 328 U.S. 640, 646-647. All that is relevant is that one of the co-conspirators killed the soldiers, which is not disputed. One co-conspirator need not even know the acts of another to be held criminally responsible for them. United States v. Davis, 809 F.2d 1194, 1203 (6th Cir. 1987).

conspiracy offense is in the agreement to commit a crime. Pinkerton, supra at 643. Moreover, under conspiracy law, a defendant may be convicted of conspiracy even though he is unaware of all the conspiracy's unlawful aims, as long as he has knowledge of some of those aims. United States v. Swiney, 203 F.3d 397403 (6th Cir. 2000).

In the instant case, Respondent committed "terrorist activity" (under Section 212(a)(3)(B)(iii)(VI) – conspiracy) upon the completion of one overt act by either himself or a co-conspirator (subsequent to the agreement to shoot members of the Turkish government if they encountered them at the border) because it was at that time the crime of conspiracy was complete. The Court notes numerous overt acts. Notably, Respondent's group positioning themselves in accordance with the PKK's handbook on guerilla warfare is a sufficient overt act. See Govt. Exhibit A, p. 21; Govt. Exhibit SS, p. 16.

Accordingly, based on the foregoing, this Court find that Respondent "engaged in terrorist activity" pursuant to Section 212(a)(3)(B)(iv) of the Act by committing a "terrorist activity" in two ways: (1) used "an explosive, firearm, or other weapon or dangerous device ... with intent to endanger ..." (under both accomplice liability and liability under the *Pinkerton doctrine*) pursuant to Section 212(a)(3)(B)(iii)(V)(b) of the Act; and (2) conspired with another to use "an explosive, firearm, or other weapon or dangerous device ... with intent to endanger ..." pursuant to Section 212(a)(3)(B)(VI) of the Act.

2. Subsection (VI)(aa), (bb) and (dd) (material support to terrorist activity)

The evidence also supports a finding that Respondent engaged in terrorist activity pursuant to Section 212(a)(3)(B)(iv)(IV)(aa), (bb) and (dd). Specifically, the Turkish conviction records, Respondent's statements in his asylum application, and Respondent's testimony at his individual hearings clearly establish that Respondent knew or reasonably should have known his activities on behalf of the ERNK (fundraising, propaganda, transportation and shelter, and providing weapons) provided material support to the PKK (an organization Respondent knew or should have known had committed or who planned to commit terrorist acts). The PKK is an organization described in Section 212 (a)(3)(B)(vi)(111) of the Act even though they were not "designated" a terrorist organization at the time, given their violent activities. See Singh-Kaur v. Ashcroft, No. 03-1766, 2004 WL 2109978, at *4 (3rd Cir. Sept. 23, 2004); Denshvar v. Ashcroft, 355 F.3d 615, 627-628 (6th Cir. 2004).

While Respondent claims he was only involved in the propaganda wing of the PKK and was unaware of the PKK's violent activities during his association with the organization (1985-1991), the Court finds such assertion to lack credibility. Rather, the Court finds that based on the evidence in the record, Respondent provided material support to the PKK, an organization he knew or should have known had committed or planned to commit terrorist acts.

The Third Circuit in Singh-Kaur v. Ashcroft, supra at *5, recently defined material support very broadly:

> The word "material" means "[h]aving some logical connection with the consequential

> facts." Black's Law Dictionary 991 (7th ed. 1999). It also means "significant" or "essential." Id. Support is defined as: "[s]ustenance or maintenance; esp. articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed." Id. at 1453.
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> * * *
>
> The list presented in INA section 212(a)(3)(B)(iv)(VI), supra, is not exhaustive. No language in the statute limits "material support" to the enumerated examples. Use of the term "including" suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories. See In re SGL Carbon Corp., 200 F.3d 154, 160 (3d Cir. 1999) (stating that a statute in which the word "including" was followed by a list of factors "strongly suggests those factors are not exhaustive").

The Court in Singh-Kaur concluded that "providing food and setting up tents" for the Babbar Khalsa Group in the mid-1980s, even though that group was not designated as a terrorist group until June 27, 2002 (long after the alien entered the United States in 1989), constituted material support. Singh-Kaur, supra at *7. The Sixth Circuit in Denshvar v. Ashcroft, 355 F.3d 615, 627-628 (6th Cir. 2004), similarly held that an alien can be held to have "engaged in terrorist activity" by supporting an organization described in Section 212(a)(3)(B)(vi)(III) of the Act that engages in terrorism even if the organization was not "designated" as a terrorist organization.

The Court disagrees with Respondent's argument that he did not support a terrorist organization because the PKK was not designated as such during his involvement. The above- mentioned decisions state the focus should be on the activities the organization engaged in rather than on whether the organization was designated a terrorist organization at the relevant time. For example, as the court explained in Singh-Kaur, supra:

> Although Babbar Khalsa and the International Sikh Youth Federation, groups to which Singh belonged, were not named Specially Designated Global Terrorist organizations until 2002, it does not follow that members of those groups were not involved in terrorist activities prior to 1989. In commenting on Singh's asylum application in 1992, the State Department concluded that: the International Sikh Youth Federation was a "radical off-shoot" of another group; that the Khalistan Commando Force, to which Singh had taken an oath, was "a notorious terrorist group responsible for a grisly April 1985 random killing in a Punjab village"; and that Babbar Khalsa was "equally notorious," was "an even more fundamentalist terrorist group with a reputation for its use of explosives" and was responsible for bombings that killed innocent people.
>
> The activities described by the State Department come within the meaning of the INA' s definition of terrorist activities because they involved assassinations and use of explosives "with intent to endanger, directly or

> indirectly, the safety of one or more individuals." INA § 212(a)(3)(B)(iii)(IV) and (V) (2002); 8 U.S.C. § 1182(a)(3)(B)(iii)(IV) and (V) (2000 & 2002 Supp.). The Amnesty International Report and Singh's own statements provide evidence that the followers of Sant Jarnail Singh also engaged in terrorist activities within the meaning of the INA.

Just as the court in Singh-Kaur used background material (and the alien's own statements) to show that the organization at issue engaged in terrorist activity before the designation, the same holds true in Respondent's case. The background material establishes the PKK engaged in terrorist activity, namely assassinations and killings using explosives, firearms, or other weapons or dangerous devices, during Respondents' s association with the group (1985-1991). For example, the Human Rights Watch World Report for 1990, a document submitted by Respondent in support of his asylum application, states:

> The PKK has been waging a guerilla war in southeast Turkey since 1984. About 2,000 have died in that time at the hands of security forces and the PKK, over a third of them villagers. ... The PKK also continues to inflict casualties on civilians.

See Exhibit 2, Tab A, pp. 39-40.

According to the Turkish Ministry of Foreign Affairs, the PKK was responsible for 55 deaths in 1984, 249 deaths in 1985, 181 deaths in 1986, 396 deaths in 1987, 226 deaths in 1988, 420 deaths in 1989, 631 deaths in 1990, and 759 deaths in 1991. Govt. Exhibit P, p. 7. Material collected by the Foreign Terrorist Tracking

Task Force ("Task Force Report")[36] also demonstrates that the PKK engaged in terrorist activity during Respondent's involvement. The Task Force Report indicates that the PKK engaged in guerrilla warfare from its inception:

> On 27 November 1978, PKK was formally but clandestinely established in the district of Diyarbakir. Its strategy was to stage a communist revolution by guerrilla warfare and establish a separate Kurdish State.

See Exhibit 2, Tab I, p. 6.

The Task Force Report further describes the PKK's early strategy as follows:

> PKK's strategy, laid down in the early 1980s, saw its battle as having three states: strategic defense, strategic balance and strategic offense. Hence the concept of "revolutionary terror" was based on conducting armed propaganda, creating a guerilla army and developing this army into a true military force.

See Exhibit 2, Tab I, p. 6.[37]

With regard to the strategic defense stage, the Task Force Report states:

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[36] Special Agent John Owens testified concerning the Foreign Terrorist Tracking Task Force on February 11, 2004. Further, the Service submitted a document discussing the Presidential Directive establishing the Task Force (Exhibit 2, Tab H), and a Department of Justice Fact Sheet on the Task Force (Govt. Exhibit, Tab O).

[37] At the February 11, 2004 hearing, Respondent testified that he agreed with the Task Force Report's assessment of the PKK's strategy.

> The strategic defense period was one in which the opposing forces were very strong and the "revolutionary forces" were very weak. In this stage, selected political violence would draw up new recruits from among the people.

See Exhibit 2, Tab I, pp. 6-7.

It was out of this stage that the PKK gave rise to the ERNK, the organization which Respondent admitted to have been a leading member. (Exhibit 2, Tab A, p. 3):

> By implementing this strategy, the PKK established in 1984 a popular front, the Kurdistan National Liberation Front, (Eniya Rizgariya Netewa Kurdistan — ERNK). The ERNK fell short of the desired impact because its hit-and-run missions lacked regional support. As a result, Ocalan [the PKK leader] decided in March 1985 to set up the Kurdistan Popular Army (Arteshen Rizgartya Gelli Kurdistan — ARGK). The ARGK was supposed to gather the non-Marxist and often religious Kurdish masses under one roof, to organize these masses into guerilla units which would be the nucleus of a people's army.
>
> It was after these changes that the PKK truly set out to fight its war and increase hit-and-run operations in Turkish territory (Exhibit 2, Tab I, p. 7).

According to the Turkish Ministry of Foreign Affairs, the ERNK was officially formed in 1985 as the initial military wing of the PKK. See Govt. Exhibit Q,

p. 2.[38] Further, the PKK itself describes the ERNK as follows: "fighting under the flag of the ERNK and armed with the weapons of the ARGK." See Govt. Exhibit P, p. 2.[39] The PKK described the duties of the ERNK on a document titled "The Mass Character of our Party and the Front," dated 1988, as:

1. Mass Activities (press meetings, raids, occupations, etc.)
2. Activities targeting Turkey:
   a. Determining on cadres and sending them to become fighters.
   b. Carrying out combat training
   c. Sending fighting forces to Turkey.
   d. Providing logistic support.
   e. Organizing links between those in Europe and Syria.
   f. Maintaining contacts with groups in prisons.
3. Working on intelligence and party security activities.
4. Creating financial resources for the movement.

See Govt. Exhibit P, pp. 1-2.

In response to the PKK's violent activities of the ERNK and the ARGK, the Turkish government set up "village guards" to protect the property and lives of villagers. As stated in the Task Force Report:

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[38] Respondent joined the ERNK at this time. See Exhibit 2, Tab A, p. 3.

[39] Respondent told the Turkish prosecutor he was a unit commander of the PKK's military wing, ARGK. See Govt. Exhibit, A, pp. 18-19. However, he failed to disclose his participation in the ARGK in his asylum application. See Exhibit 2, Tab A.

> After the PKK's first attacks in 1984 ... [t]he Motherland Party (ANAP) ... created the "temporary village guards" in areas where activities of violence required a state of emergency and in order to prevent aggression against the property or lives of the villages.

See Exhibit 2, Tab I, p. 7.

In response to the village guard system, the PKK increased its violence:

> As soon as the village guard system was established, the PKK turned its full attention to these para-military forces with the goal of preventing recruitment to them. As of 1985, more and more attacks were thus recorded against "civilians". Those killed, including Kurdish infants and woman, were related to the village guards. The message was that any family "who dealt with the state" would be destroyed.

See Exhibit 2, Tab I, p. 7.

Moreover, from 1987 through 1989, the PKK established its own "mountain units" to fight against the government and perceived collaborators:

> By 1987, the PKK had manages to get better organized and had recruited thousands of sympathizers. It had created a popular front, which gathered and organized non-Marxist Kurdish peasants and so-called people's army, which trained full time fighters or the movements "mountain unit". That year the PKK attacked many Kurdish villages in the Southeast declaring them as "state collaborators."

> In 1988 and 1989, the situation was similar. Militants of the PKK, then in its growing period, raided one village after another, killing women and children and explaining these attacks as offensives against village guards. Many hundreds of civilians were killed in this campaign, which frustrated state officials and security forces.

See Exhibit 2, Tab I, p. 7.[40]

The United States Department of State publication, Patterns of Global Terrorism ("PGT Report"), is also compelling evidence that the PKK engaged in terrorism during Respondent's association with the group. For instance, in the 1986 report the State Department states:

> The most serious new development in anti-Turkish terrorism last year was the escalating violence of the separatist Kurdish Worker's Party (PKK) after Ankara retaliated for a bloody PKK attack that killed 13 Turkish soldiers in August by launching an air strike against the group's camps in Iraq that same month. In October, the PKK expanded its list of targets to include NATO, attacking a radar site in the southeast with rockets and

---

[40] Respondent admitted in his asylum application that he was in the mountains of Turkey at this time on behalf of the ERNK and the PKK. See Exhibit 2, Tab A, p. 7, describing his activities as an "educator/activist." At the February 11, 2004 hearing, in direct contradiction to the Task Force Report, Respondent claimed he did not engage in violence in the mountains, but rather only participated in propaganda. Respondent has never stated the exact nature of the propaganda he disseminated.

automatic weapons. The group also targeted Turkish officials. Elsewhere in Europe:

- A young PKK member was arrested in West Germany in August as he opened a train station locker containing explosives, weapons, and ammunition. He was apparently planning to attack the Turkish Consulate General in Hamburg but was later released for lack of evidence.
- Dutch officials apprehended in late August a PKK activist who planned to attack a Turkish consulate in The Netherlands. He was carrying weapons and explosives at the time of his arrest.

See Govt. Exhibit U, p. 28.

Finally, an abundance of de-classified material from the Central Intelligence Agency establishes that the PKK engaged in terrorist activities during Respondent's affiliation with the group (1985-1991). See Govt. Exhibit R (De-classified CIA Terrorism Review), Govt. Exhibit W (Terrorism Review, April 9, 1987), Govt. Exhibit Y (Terrorism Review, July 16, 1987), and Govt. Exhibit AA (The Kurds: Rising Expectations, Old Frustrations, Intelligence Estimate).

In the instant case, Respondent's support of the PKK was much more substantial than "providing food and setting up tents," the activity the Third Circuit in Singh-Kaur found to constitute "material support." In fact, three facets of Respondent's support are specifically mentioned in Section 212(a)(3)(B)(iv)(VI), the first being fundraising.

a. Fundraising

At the February 11, 2004 hearing, Respondent testified before the Court that he, as a leading member

of the ERNK, helped organize events in various parts of Europe where money was raised for the PKK. Respondent admitted he was aware that money raised at these events went to the PKK. The PKK's presence at these events was unmistakable—the PKK flag was displayed and the speakers specifically mentioned the PKK. Also, Respondent admitted these events were similar to the "special nights" PKK fund raising events referenced in the Task Force Report, (Exhibit 2, Tab I, p. 12), and in internal PKK documents See Govt. Exhibit P, p. 2. Further, Respondent's admission in his asylum application that he "published magazines" on behalf of the ERNK (Exhibit 2, Tab A, p. 3) is consistent with the PKK fundraising technique of obtaining "grants and subscriptions" and "sales of publications." See Govt. Exhibit P.

b. Propaganda

Respondent's material support to the PKK also consisted of his participation in the propaganda machine of the PKK, namely the ERNK. Respondent stated in his asylum application and testified before the Court on February 11th that he organized meetings, handed out literature, and published articles against the Turkish government for the ERNK. See Exhibit 2, Tab A, pp. 3-4. Furthermore, when Respondent was eventually arrested by the Turkish authorities in October 1988, he admitted he engaged in propaganda on behalf of the PKK in Germany, France and Switzerland. See id., p. 11. He even told the Turkish prosecutor he acted on the PKK's behalf in Germany as early as 1982. Id., p. 18. Moreover, the State Security Court made a factual finding that he was an active member of the PKK. Id., p. 27. This is supported by Respondent's own statements to the Turkish soldiers

(Id., p. 11), to the public prosecutor (Id., p. 18), to the Peace Criminal Court (Id., p. 20), and to the State Security Court (Id., p. 20). This is further evidenced by Respondent's meetings with Addullah Ocalan, the PKK leader, on numerous occasions. Id., pp. 12, 28.

Additionally, Respondent testified at his individual hearing that he attended a PKK camp to learn how to survive in the mountains so he could return to Turkey surreptitiously to engage in protests and propaganda on behalf of the PKK. He earlier admitted the same information to the FBI at the September 19, 2003 interview. See Exhibit 5, p. 3.

The propaganda machine of the PKK was indispensable to its operation. This is supported by the Task Force Report. This Report notes the PKK established the ERNK to operate front organizations to bolster PKK's propaganda and operational capabilities. See Exhibit 2, Tab I, p. 12. Moreover, the ERNK manipulated and guided these front organizations and disguised them as sociocultural associations. See id. The Report concludes that these "front organizations" which provided political, moral and financial support, were **indispensable** to the PKK's survival. Id.

Respondent's admissions regarding his participation in the PKK propaganda machine is corroborated by the Turkish court's factual findings supporting his conviction. For example, the Court found that:

> In the context of Kurdish-separatist associations in relation with PKK terrorist organization in Germany, France and Switzerland, he [Respondent] undertook active role. He was using the nickname Ayhan (C), in

> course of this responsibility in Europe. Upon the request of European responsible person of the organization, he left for Damascus in order to attend the Camp "Helve". He met the general secretary of the organization—Abdullah Ocalan [the head of the PKK], at home, where he was staying. Later he was transferred to the Camp Helve of the organization. In that camp he undertook a political and military course for 6 months. (Govt. Exhibit A, pp. 27-28).
>
> * * *
>
> In this way, the accused Ibrahim Parlak carried out the role of group administrator in the PKK organization, thus undertaking both abroad and in Adlyaman Province and vicinities organizational endeavors with their continuity and diversity. (Id., p. 37).

See Govt. Exhibit A, pp. 27-28, 37.

c. Transportation and Shelter

Respondent provided material support to the PKK by helping individuals who attended the PKK training camp attempt to enter Turkey from Syria in May 1988. This included the firefight Respondent and his group engaged in with the Turkish soldiers at the Syrian/Turkish border. See Exhibit 2, Tab A, pp. 9-10; see also Govt. Exhibit A, pp. 27-31. Further, Respondent successfully helped fellow PKK members cross the Syrian/Turkish border on June 1, 1988. See Govt. Exhibit A, pp. 31-32. Moreover, after Respondent successfully entered Turkey, he built ammunition depositories and shelters for the PKK. See Govt. Exhibit A, pp. 14-15, 18-19, 31-32, 35-36.

As Section 212(a)(3)(B)(iv)(VI)(aa), (bb) and (dd) specifically defines "material support" to include providing "transportation" and a "safe house," the Court finds Respondent's actions fall within the Act's definition of "material support."

d. Providing weapons

Respondent provided material support to the PKK by transporting firearms and ammunition from Syria into Turkey. He also provided ammunition to fellow PKK members in Turkey. Specifically, Respondent and his PKK associates transported guns and ammunition from Syria to Turkey and then buried those items at a mineral mine in the Turkish mountains. See Govt Exhibit A, p. 32. He also prepared depositories to hold additional firearms and ammunition. See id. Respondent then transferred ammunition to another PKK group, and then transferred other firearms and ammunition to shelters he and his group previously built. Id., p. 34, 36. Based on the foregoing, Respondent's actions clearly fall within the Act's definition of "material support" as section 212(a)(3)(B)(iv)(VI)(aa), (bb) and (dd), specifically defines "material support" to include providing "weapons."

Th Court finds that the objective evidence establishes that Respondent "engaged in terrorist activity" pursuant to Section 212(a)(3)(B)(iv)(VI) of the Act. Specifically, Respondent knew or should have known that his fundraising, propaganda, transportation and shelter, and provision of weapons provided material support to the organization. Moreover, given the background material on the PKK, Respondent knew or should have known that the PKK had committed or planned to commit terrorist activity.

3. Subsection (IV)(cc) (solicitation of funds)

The Court finds the same evidence discussed above that supports the terrorism charge premised on Section 212(a)(3)(B)(iv)(VI) (material support) also supports the charge under Section 212(a)(3)(B)(iv)(1V)(cc) (solicitation of funds). Specifically, Respondent's participation in the ERNK/PKK events where money was collected for the PKK undeniably constitutes solicitation of funds for an organization that has engaged in terrorist activity. It does not matter that the PKK was not designated a "terrorist organization" when Respondent solicited funds for the PKK because Section 212(a)(3)(B)(vi)(III), the section referenced in Section 212(a)(3)(B)(iv)(IV)(cc), does not require such. See Daneshvar v. Ashcroft, 355 F.3d 615, 627-628 (6 Cir. 2004).

Respondent has failed to show that he did not know (and should not have known) that the money he solicited for the PKK would further the PKK cause.[41] Notably, Respondent joined the ERNK/PKK when it was formed to be a military group. He indicated in his asylum application that he was a "leading member" of the ERNK. Further, he traveled throughout Europe to carry out activities on behalf of the ERNK/PKK. He also met with the PKK leader, Abdullah Ocalan, on numerous occasion, which included a meeting before he and his unit infiltrated Turkey. Accordingly, the Court is hard pressed to find Respondent did not know (and

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[41] Respondent has provided conflicting testimony concerning his knowledge of whether funds raised by the ERNK were provided to the PKK. In February 2004, he stated they were; however, he later changed his testimony, stating they might have been provided to the PKK.

should not have known) the funds he solicited would further the PKIC's terrorist activity.

Based on the evidence in the record, the Court finds Respondent has "engaged in terrorist activity" as defined in Section 212(a)(3)(B)(iv) of the Act. Specifically, the Court finds Respondent engaged in terrorist activity pursuant to Section 212(a)(3)(B)(iv)(I) of the Act as evidenced by his participation in the killing of two Turkish soldiers with a firearm and a grenade. Further, Respondent engaged in terrorist activity pursuant to Section 212(a)(3)(B)(iv)(VI)(aa), (bb), and (dd) of the Act in that he provided material support to the PKK, a terrorist organization, by participating in fundraisings and propaganda on behalf of the PKK, and providing transportation, shelter and weapons to the PKK. Finally, Respondent engaged in terrorist activity pursuant to Section 212(a)(3)(B)(iv)(IV) (cc) of the Act in that he solicited funds for the PKK. Accordingly, the Court sustains the terrorism charges of removability.

IV. CONVENTION AGAINST TORTURE

Respondent has requested consideration for deferral of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). See 8 C.F.R. § 1208.18(b)(1); also see 8 C.F.R. §§ 1208.16 and 1208.17.[42]

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[42] As Respondent has been convicted of an aggravated felony, he is subject to mandatory denial of withholding of removal under the Torture Convention. See 8 C.F.R. § 1208.16(d)(2). Accordingly, the Court will only consider his request for deferral of removal under the Torture Convention.

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000); see also, All v. Reno, 237 F.3d 591 (6th Cir. 2001).

For an act to constitute "torture" it must satisfy each of the five elements in the definition of torture found in the regulations. See 8 C.F.R § 1208.18(a). The act must cause severe physical or mental pain or suffering. The act must be intentionally inflicted. The act must be inflicted for a proscribed purpose as defined in the regulations. The act must be inflicted by or at the instigation of a public official or with the consent or acquiescence of such official who has custody or physical control of the victim. Finally, the act must not arise for the imposition of lawful sanctions. Matter of J-E-, 23 I&N Dec. 219 (BIA 2002).

The term "activity constituting torture" does not simply refer to general violence. Rather, the referenced activity must be the very torture that the applicant claims to fear. Matter of S-V-, supra. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a particular country does not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir 2003).

Under the Torture Convention, the harm feared must be "inflicted by or at the instigation of or with the consent of a public official or other person acting in a official capacity." 8 C.F.R. § 1208.18(a)(1). Where the

alien alleges a likelihood of torture from non-governmental sources he must demonstrate that the governmental officials are "wilfully accepting of" the non-governmental source's torturous conduct. Matter of S-V-, supra.

A public official's acquiescence to torture requires that he have an awareness of the activity prior to its commencement and breach a legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); Ali v. Reno, supra. Consequently the definition of "torture" includes acts that occur in the context of governmental authority. Id; see also 64 Fed. Reg, 8478, 8482 (1999).

Article 3 of the Torture Convention does not extend protection to persons who fear entities that a government is unable to control. Matter of S-V-, supra. To demonstrate acquiescence the respondent must show more than the fact that the governmental officials are aware of such activity constituting torture, but are powerless to stop it. Id; see also Matter of Vilalta, 20 I&N Dec. 142, 147 (BIA 1990).

If the Immigration Court determines the alien is "more likely than not" to be tortured in the country of removal, the applicant for withholding of removal under the Torture Convention shall be granted, unless the alien is subject to a ground of "mandatory denial." See 8 C.F.R. § 1208.16(c)(4) and 1208.16(d)(1) and (2). For applications filed on or after April 1, 1997, withholding of removal must be denied if the alien is deport able under Section § 237(a)(4)(D) of the Act [assistance in Nazi persecution or genocide]; if the alien participated in the persecution on a basis enumerated in the statute; if the alien has been convicted of a particularly serious crime; if there is reason to believe

that the alien committed a serious, nonpolitical crime; or if there are reasonable grounds to believe that the alien is a danger to the security of the United States. See 8 C.F.R. § 1208.16(d)(2); see also Section 241(b)(3)(B) of the Act.

Even aliens subject to mandatory denial of withholding of removal under the Torture Convention, may still be eligible for deferral of removal pursuant to 8 C.F.R. § 1208.17. An alien who has been ordered removed, who has been found eligible for protection under the Torture Convention, see 8 C.F.R. § 1208.16, but is subject to the mandatory denial provisions of Section 241(b)(3)(B) of the Act, shall be granted deferral of removal. See 8 C.F.R. § 1208.17. This relief is limited however. It does not mean that the alien will be released from detention, nor does it confer any permanent immigration benefit on the alien. It is effective only until terminated, and is subject to periodic review by the Immigration Court to determine whether in removing the alien, there continues to be a threat, more likely than not, that the alien will be tortured. If conditions have changed in the country directed for removal, to such an extent that it is no longer more likely than not that the alien will be tortured if removed, then he will be removed. See 8 C.F.R. § 1208.17(b)(1).

Application

The Court finds Respondent is not eligible for deferral of removal under the Torture Convention. As stated above, to qualify for deferral of removal, Respondent must demonstrate it is more likely than not he would be tortured if he were removed to Turkey. 8 C.F.R. § 1208.17(a). Respondent has failed to establish it is more likely than not he would be

tortured if removed to Turkey. The Court notes the heart of Respondent's claim is he fears he will be tortured by members of the PKK, as he had betrayed the group by invoking the "code of confession."

Respondent testified of past incidences of torture by the Turkish government. He stated that in October 1988, after he was arrested by Turkish police, he was interrogated and tortured by the police. He claimed he endured beatings and sessions of torture at three different police stations. He also claimed he received scars from the incidents and injury to his internal organs.[43]

Currently, Respondent claims he fears he will be tortured if removed to Turkey, as his removal proceedings in the United States have been widely reported in his home town in Turkey. He indicated he fears he will be targeted by former PKK members or sympathizers of the Kurdish cause. In support of his application for relief, Respondent has provided several Turkish articles. The Court notes, however, that none of these articles establish that Respondent should fear return to Turkey. Respondent also provided unconvincing expert witness testimony to support his claim. The expert witness testified that a traitor of the Kurdish cause, or one that invoked the code of confession against other PKK members, would be in danger by PKK members and receive no protection from the government. Respondent presented no other evidence to substantiate this claim.

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[43] Notably, in Respondent's asylum application, he indicated that he still had "scars from these torture sessions." Yet, at his hearing, Respondent did not expose his scars or present any medical records evidencing such scars or injury.

Respondent also indicated he fears torture by the government; specifically, by law enforcement officers who felt he got off too easy with a 16-month sentence. The Court is not persuaded by this assertion, as Respondent has already served his sentence and there is no indication the government is otherwise targeting him. Notably, Respondent indicated in his application for relief that if he were forced to return to Turkey, he "could not sit by without speaking out on [Kurdish] issues, which ... would place [him] at risk of punishment through torture by local authorities." The Court questions why Respondent would intentionally make himself a purported target by becoming an outspoken advocate, especially since he has not participated in such activity since 1991.

The *2003 Country Report on Human Rights Practices* for Turkey released by the Department of State indicates human rights violations were reported. Specifically, leftist and Turkish rights activists, primarily in southeast Turkey, reported incidents of torture. The Country Report states the Turkish government has taken steps to end the practice of torture. Further, the number of credible applications by torture victims was reduced in 2003. Moreover, Turkey has also taken steps to improve its human rights record in its efforts to join the European Union. See Govt. Exhibits CC, DD and EE (Documents from the Commission of the European Communities). As such, there is no indication Respondent would be tortured by the government if returned to Turkey.

Finally, the Court questions Respondent's credibility with regards to his present claim for relief. The Court notes Respondent's pattern of misrepresentations, which began in 1991 when he

presented a fraudulent passport to enter the United States. He omitted and misrepresented key events in his asylum application and also submitted a falsely translated document with the application. Moreover, the Court notes the misrepresentations in Respondent's adjustment application, his naturalization application and even his application for a liquor license. When questioned about the misrepresentations and omissions, Respondent merely claimed he did not prepare the documents and the information was incorrect. Lastly, Respondent provided inconsistent and unbelievable testimony at the hearings, and was found to be not credible.

Having considered all the evidence in the record, the Court finds Respondent has not established that it is more likely than not he would be tortured if removed to Turkey. Accordingly, the Court will deny Respondent's application for deferral of removal under the Torture Convention.

V. CONCLUSION

The Court notes that this matter has been a long and difficult hearing. Respondent has had two hearings before the Court, the second lasting two days. Respondent has resided in the United States for over a decade. During that time, he has established a home and business, as well as, numerous ties to individuals. There is no evidence that Respondent has continued with activity on behalf of either the ERNK or the PKK in the United States. He has lived the life of a restauranteur in the small Michigan town of Harbert. Indeed, Respondent himself has stated he is not the same person who acted on behalf of the ERNK and entered Turkey in late 1980s. However, Respondent's actions as a restauranteur, father and resident of

Harbert are not the subject of this hearing. Respondent is accountable for the actions he took prior to entry into the United States and the actions in obtaining his status under the immigration laws before this Court. The decision is premised on these grounds.

In a removal proceeding the Service bears the burden of proving removability by clear and convincing evidence. See INA § 240(c)(3); 8 C.F.R. § 1240.8(a). The Court finds the Service has sustained its burden regarding the seven charges of removability in this matter.

VI. ORDER

IT IS HEREBY ORDERED that Respondent is removable as charged as is ordered removed to TURKEY.

IT IS FURTHER ORDERED that Respondent's application for relief under the Torture Convention is DENIED.

s/ Elizabeth A. Hacker
Elizabeth A. Hacker
U.S Immigration Judge

Dated this 29th day of December, 2004

8 U.S.C. § 1103

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

* * *

8 U.S.C. § 1231(b)(3)

§ 1231. Detention and removal of aliens ordered removed

* * *

(b) Countries to which aliens my be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

... [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) [8 U.S.C. § 1227(a)(4)(D)] or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

* * *

Supreme Court, U.S.
FILED
MAY 10 2010
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No. 09-992

In the Supreme Court of the United States

IBRAHIM PARLAK, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by not remanding to the Board of Immigration Appeals when the Board correctly applied the proper legal standard in finding petitioner ineligible for withholding of removal because of the "persecutor bar," 8 U.S.C. 1231(b)(3)(B)(i), but, at one point in its order, articulated that standard in a "vague and unhelpful" way.

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In the Supreme Court of the United States

No. 09-992

IBRAHIM PARLAK, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 578 F.3d 457. The decisions of the Board of Immigration Appeals (Pet. App. 55a-84a) and the immigration judge (Pet. App. 85a-175a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2009. A petition for rehearing was denied on November 24, 2009 (Pet. App. 47a-54a). The petition for a writ of certiorari was filed on February 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney Gener-

al may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). A "refugee" is an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An applicant bears the burden of demonstrating he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

An alien is statutorily ineligible for asylum if the Attorney General determines that "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1158(b)(2)(A)(i); see 8 U.S.C. 1101(a)(42)(B) ("[A]ny person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" cannot be a "refugee.").

b. An alien may also apply for withholding of removal. See 8 U.S.C. 1231(b)(3). Withholding of removal is required if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, an alien is not eligible for withholding of removal if the Attorney General determines that the alien "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(B)(i). Like its

asylum counterpart, this provision is referred to as a "persecutor bar."

2. a. Petitioner, a native and citizen of Turkey, is an ethnic Kurd. Pet. App. 3a. He became involved in Kurdish separatist activities in Turkey in the 1970s. *Ibid.* In 1980, he moved to Germany, where he continued his involvement in such activities. *Ibid.* In particular, he organized events on behalf of the National Liberation Front of Kurdistan (ERNK) and solicited funds for it. *Id.* at 59a-60a.

As petitioner later acknowledged, ERNK "had close ties to the PKK [Kurdistan Workers Party]," and "[h]e was aware that some of the money raised for the ERNK would go to the PKK." Pet. App. 3a, 60a. The PKK was founded in the 1970s to establish an independent Kurdish state. Administrative Record 538, 540 (A.R.). It is a "guerrilla separatist movement" that "frequently kidnaped and killed teachers," "conducted * * * attacks against civilians * * * , includ[ing] * * * women and children," launched "terrorist attacks of tourist sites such as hotels and even beaches," and "used suicide bombing as a tactic." A.R. 846-847. The Secretary of State designated the PKK a foreign terrorist organization in 1997. See 62 Fed. Reg. 52,650-52,651 (1997); see also 8 U.S.C. 1189 (governing designation of foreign terrorist organizations).

In 1987, petitioner went to Lebanon to join the PKK. Pet. App. 3a. He stayed in a PKK training camp in Lebanon for eight months, where he received "'military' and 'guerilla' training." *Id.* at 3a, 60a. While at the camp, petitioner met with Abdullah Ocalan, the leader of the PKK. *Id.* at 61a.

In May 1988, petitioner (armed with a pistol, an AK-47, and a grenade) led a group from the PKK camp in an

attempt to cross from Syria into Turkey. Pet. App. 3a, 61a. A gun battle ensued between petitioner's group and Turkish border guards, leaving two Turkish soldiers dead. *Id.* at 3a. Petitioner and the other Kurds escaped, returning to Syria. *Id.* at 61a-62a, 63a.

Later in 1988, petitioner "and some of his men crossed into Turkey without incident." Pet. App. 62a. Petitioner then "traveled to various villages to make connections * * * and began to bury extra weaponry and to construct underground shelters." *Ibid.* Nearly four months after petitioner's surreptitious entry into Turkey, he was arrested by Turkish soldiers and charged with "advocating for the separation of Turkey." *Ibid.* He was convicted and served 18 months in prison. *Ibid.* According to petitioner, he was tortured while detained by the Turkish authorities. *Id.* at 63a.

In 1991, petitioner used a fraudulent passport to be admitted to the United States. Pet. App. 4a, 63a. Petitioner applied for asylum, alleging that Turkish officials had persecuted him because of the "leading role" he had played in the ERNK. *Id.* at 65a; see *id.* at 3a. In his asylum application, he disclosed some aspects of the May 1988 incident at the Turkish-Syrian border, but failed to disclose that two Turkish soldiers had died. *Id.* at 63a. He submitted a translation of a newspaper article about his arrest in Turkey, but the translation omitted a passage from the original article that disclosed the deaths of the two Turkish soldiers. *Id.* at 96a-97a & n.8; see *id.* at 65a. Petitioner received asylum in the United States in 1992. *Id.* at 57a.

In 1994, petitioner applied for and received lawful permanent resident status. Pet. App. 57a. In 1998, petitioner applied to become a United States citizen. *Id.* at 4a. In neither his application for lawful permanent resi-

dent status nor in his naturalization application did petitioner mention his 1988 arrest and conviction in Turkey. *Ibid.* For example, on his application for adjustment of status, petitioner was asked "Have you ever, in or outside the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?" *Id.* at 111a. Petitioner answered "No." *Ibid.*

Petitioner's naturalization application was denied. Pet. App. 4a. He was then charged with being removable because of the false statements on his application for permanent resident status. *Ibid.*; see 8 U.S.C. 1227(a)(1)(A). Petitioner was later charged with being removable on the additional basis that he had engaged in terrorist activity. Pet. App 4a.

b. After a hearing, an immigration judge (IJ) found petitioner removable, both for making false statements and for having engaged in terrorist activity. Pet. App. 85a-168a, 175a. The IJ also found petitioner ineligible for withholding of removal because he had assisted or otherwise participated in persecution. *Id.* at 118a-125a.

The Board of Immigration Appeals (BIA) dismissed petitioner's administrative appeal. Pet. App. 55a-84a. The BIA affirmed the IJ's finding that petitioner was removable because he made willful misrepresentations on his applications for adjustment of status and naturalization by falsely stating that he had never been arrested. *Id.* at 67a-69a. The BIA also affirmed the IJ's determination that petitioner was removable on terrorism grounds under 8 U.S.C. 1227(a)(4)(B). Pet. App. 75a-80a.

The BIA also affirmed the IJ's conclusion that petitioner was ineligible for withholding of removal because he had assisted in the persecution of others. Pet. App.

69a-73a. After stating that "[a] person assists in the persecution of others when he furthers the persecution in some way," the BIA found that petitioner was ineligible for withholding of removal because he had knowingly taken "significant" actions that "furthered the persecution of those Turks who opposed a separate Kurdistan." *Id.* at 70a. In particular, the BIA noted that petitioner had "transport[ed] weapons into Turkey for use by the PKK." *Ibid.* He acknowledged having disclosed to Turkish authorities "the location of stores of buried weapons, including rockets, after being arrested in 1988," and this knowledge was "inconsistent with [petitioner's] explanation that he carried only a small cache of weapons across the border for his own protection." *Ibid.* Indeed, this knowledge supported the conclusion that petitioner was in fact "a fighter for the armed wing of the PKK." *Ibid.* The BIA also concluded that petitioner had advanced the persecution of Turks who opposed the PKK by raising funds destined for the organization. *Id.* at 70a, 71a.

The BIA concluded that petitioner took these actions with knowledge that they would further the PKK's persecution of its opponents. Pet. App. 71a-72a. Petitioner acknowledged knowing that some of the money he raised for the ERNK in Germany would actually go to the PKK. *Id.* at 71a. He also admitted knowing that the PKK attacked civilian "village guards" opposed to it and the group "advocated 'revolutionary terror.'" *Ibid.* In sum, the BIA found that "[t]he record * * * supports the conclusion that [petitioner] knowingly assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state." *Id.* at 72a; see *id.* at 76a ("The record reflects that even before the PKK was designated as a

terrorist organization in 1997, [petitioner] understood the organization to be conducting terrorist activity.").

c. Petitioner filed a petition for review in the court of appeals, which denied it. Pet. App. 1a-46a. The court found that substantial evidence supported the BIA's conclusion that petitioner was removable because he had made willful misrepresentations in his applications for adjustment of status and naturalization. *Id.* at 10a-13a. In particular, the court concluded that the BIA's finding that petitioner's misrepresentations about his prior arrest and conviction were deliberate was supported by substantial evidence, given how "unambiguous" the questions to which he gave false answers were and given the earlier misrepresentations in petitioner's asylum application. *Id.* at 11a (noting that petitioner had "submitted a falsely translated newspaper article" with his asylum application).[1]

The court of appeals also affirmed the BIA's conclusion that petitioner was not eligible for withholding of removal because of the persecutor bar. Pet. App. 13a-23a. Like the BIA, the court of appeals assumed for the sake of its decision that petitioner's statements to the Turkish authorities (which he said were procured by torture) were unreliable. *Id.* at 15a n.8. Even without those statements, the court found there was substantial evidence supporting the BIA's conclusion that petitioner "assisted in the persecution of others by providing funding for the PKK and transporting weapons into Turkey for use by the PKK." *Id.* at 16a.

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[1] Given its conclusion that substantial evidence supported the BIA's finding that petitioner was removable for making willful misrepresentations, the court found it unnecessary to review the BIA's separate conclusion that "he was also removable for terrorist activity." Pet. App. 12a-13a, 14a n.6.

The court of appeals noted that "every circuit court to have substantively addressed the issue" had agreed that the scope of the persecutor bar was informed by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). Pet. App. 20a n.9; see *ibid.* (noting that both petitioner and the government agreed that the *Fedorenko* standard governed). The court of appeals concluded that "the BIA's analysis was consistent with *Fedorenko*." *Id.* at 21a. As the court noted, the BIA found that petitioner had provided money and weapons to the PKK and had done so "voluntarily and knowingly." *Id.* at 21a-22a. Accordingly, the BIA's findings demonstrate that "a nexus exists between [petitioner's] actions and the persecution of others and [petitioner] acted knowingly." *Id.* at 22a. Although the court deemed one sentence from the BIA's opinion (that "[a] person assists in persecution of others when he furthers the persecution in *some* way") "vague and unhelpful on its own," the court concluded that the BIA had in fact applied the correct standard. *Id.* at 21a; see *id.* at 21a-23a.

Judge Martin dissented. Pet. App. 25a-46a. In the dissenting judge's view, the court of appeals should have remanded the case to the BIA for reconsideration of whether the persecutor bar applied. *Id.* at 28a-29a. Judge Martin also contended that the BIA erred by "attempt[ing] to uphold the IJ's various conclusions without regard to the tainted evidence" obtained in the Turkish court, *id.* at 37a, and that the BIA had applied an erroneous standard when it concluded that petitioner had made willful misrepresentations on his naturalization and adjustment of status applications, *id.* at 38a-44a.

The court of appeals subsequently denied rehearing. Pet. App. 47a-48a; see *id.* at 48a-54a (Martin, J., dissenting from denial of rehearing en banc).

ARGUMENT

Petitioner is correct that the "ordinary remand rule," as articulated in *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), and *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam), typically requires courts of appeals to remand to the BIA once they conclude that it applied the incorrect legal standard. That rule has no application here, however, because the court of appeals found that the BIA applied the correct legal standard. For the same reason, the court of appeals' decision does not present the question—which petitioner mistakenly claims has divided the circuits—whether remand is required "where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22. In this case, the BIA made neither kind of error, so the court of appeals did not have to decide whether to remand.

1. The court of appeals correctly held that "the BIA did not err in its legal analysis," so no remand was necessary. Pet. App. 23a. As the court of appeals noted (and as both parties agreed below), application of the persecutor bar to an alien's voluntary actions is illuminated by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). Pet. App. 18a-21a. In that case, the Court found that a World War II concentration camp guard who had shot at fleeing inmates had "assisted in the persecution of civilians" within the meaning of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, notwithstanding his claim that he had done so involuntarily. *Fedorenko*, 449 U.S. at 495, 500, 512. The Court concluded that the statute included no voluntari-

ness requirement, but did require "focus[] on whether particular conduct can be considered assisting in the *persecution* of civilians." *Id.* at 512 n.34. The Court went on to explain:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Ibid.

In a case decided five months before this one, the Sixth Circuit explained that *Fedorenko*'s understanding of the persecutor bar included "two distinct requirements"—nexus and knowledge. *Diaz-Zanatta* v. *Holder*, 558 F.3d 450, 455 (2009). "First, the alien must have done more than simply associate with persecutors; there must have been some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution." *Ibid.* Second, "if such a nexus is shown, the alien must have acted with scienter; the alien must have had some level of prior or contemporaneous knowledge that the persecution was being conducted." *Ibid.*

The court of appeals in this case concluded that the BIA had applied the correct legal standard from *Fedorenko* and *Diaz-Zanatta*. Pet. App. 21a-23a. The court read those cases to mean that the persecutor bar applies to aliens who provide "genuine assistance in persecution" and not to those with a merely "inconsequential association with persecutors." *Id.* at 21a. As the court of appeals explained, the BIA in this case applied that "nexus" standard when it analogized petitioner's "provision of weapons for PKK fighters" to another alien's "coordination of arms shipments for the Provisional Irish Republican Army," which the BIA in an earlier decision had concluded constituted "assisting in persecution." *Ibid.* (citing *In re McMullen*, 19 I. & N. Dec. 90, 97 (B.I.A. 1984)); see *id.* at 71a (BIA concludes that petitioner's actions were "'virtually identical' to the conduct of the alien involved in the *McMullen* case."). As both the BIA and the court of appeals recognized, providing weapons to a group known to use weapons "to *target*[] civilians and not just government soldiers" constitutes genuine assistance in persecution. *Id.* at 21a, 71a, 73a. It is not mere association.

The BIA likewise understood there was a scienter requirement and found it satisfied in this case. The BIA found that petitioner "*knowingly* assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state." Pet. App. 72a (emphasis added). The BIA expressly found that petitioner "admitted knowing that at least part of the money he raised would go to support the PKK" and "admitted knowing that the PKK engaged in attacks on the village guards and that they, in general, advocated 'revolutionary terror.'" *Id.* at 71a; see *id.* at 76a ("The record reflects that even before the

PKK was designated as a terrorist organization in 1997, [petitioner] understood the organization to be conducting terrorist activity."). Thus, when the court of appeals noted that petitioner "voluntarily and knowingly provided money, which he knew could be used by the PKK for anything, * * * and weapons, which directly supported the PKK's persecution of others," *id.* at 22a, it was not engaged in its own "independent analysis" of the record, see Pet. 22. Rather, it was merely affirming findings expressly made by the BIA. See Pet. App. 17a ("Substantial evidence * * * supports the BIA's factual determinations.").

The BIA's application of the proper standard in this case is further illustrated by its reliance on *In re A-H-*, 23 I. & N. Dec. 774, 784 (A.G. 2005). The court of appeals in *Diaz-Zanatta* noted that its distillation of the "nexus" and "scienter" requirements from *Fedorenko* was "consistent with" the BIA's "leading * * * adjudication on this issue," which it identified as *In re A-H-*. *Diaz-Zanatta*, 558 F.3d at 455 & n.2. In the BIA's decision in this case, it expressly relied on *In re A-H-* when it concluded that petitioner's "provision of the weapons to PKK fighters qualifies as 'assisting in' the persecution of others." Pet. App. 70a (citing *In re A-H-*, 23 I. & N. Dec. at 784).

Petitioner's argument that the BIA applied the wrong standard in finding him ineligible for withholding of removal rests on the BIA's statement that "[a] person assists in the persecution of others when he furthers the persecution in some way." Pet. App. 70a; see, *e.g.*, Pet. 16. The court of appeals characterized that shorthand description of the standard as "vague and unhelpful *on its own*." Pet. App. 21a (emphasis added). As the court of appeals recognized, however, a proper determination

of what legal standard the BIA applied must be based on the BIA's order as a whole, not on one summary sentence read "on its own." *Ibid.* As noted previously, the order as a whole demonstrates that the BIA applied the correct standard, and did so in a way consistent with the court of appeals' earlier decision in *Diaz-Zanatta*. Moreover, the court of appeals' particular concern with the shorthand statement was that, when read "on its own," it could suggest that "inconsequential association with persecutors" was sufficient to trigger the bar. *Ibid.* As the court immediately went on to note, however, that is not the standard the BIA applied here—it demanded evidence of genuine assistance and found it in petitioner's provision of weapons to the PKK. *Ibid.*[2]

This case thus does not present the remand question posed in *Ventura* and *Thomas*. In *Ventura*, the Ninth Circuit had reversed the BIA's finding that an alien was ineligible for asylum because the persecution he alleged before he left Guatemala was "not 'on account of' a 'political opinion.'" 537 U.S. at 13 (citation and emphases omitted). The government had argued before the IJ that the alien was independently ineligible for relief because conditions had improved in Guatemala since his departure. *Ibid.* The BIA had not considered that argument, "[a]nd both sides asked that the Ninth Circuit

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[2] Amicus National Immigrant Justice Center contends (Br. 11) that the court of appeals "took the impermissible step of establishing immigration policy" by relying on petitioner's fundraising for the PKK. The court of appeals broke no ground on this issue; it merely affirmed the BIA's conclusion that petitioner "furthered the persecution of those Turks who opposed a separate Kurdistan by providing funding for the PKK." Pet. App. 70a. Moreover, Amicus ignores the separate finding by the BIA (affirmed by the court of appeals) that petitioner provided the PKK with weapons, with knowledge that the PKK attacked civilian village guards. *Id.* at 16a-17a, 21a, 70a-71a.

remand the case to the BIA so that it might do so." *Ibid.* Instead, the Ninth Circuit decided the question for itself, "holding that the evidence in the record failed to show sufficient change." *Id.* at 14. This Court held that the Ninth Circuit erred by reaching out to decide a question that had not been decided by the BIA; the court of appeals should have "remand[ed] [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16.

Thomas presented a similar situation. The aliens there sought asylum because they said they feared persecution based on their race and on their membership in a particular "social group"—their family. 547 U.S. at 184. The BIA found them ineligible for asylum, "responding to [their] primarily race-related arguments." *Ibid.* The Ninth Circuit held that the BIA had not adequately considered the aliens' alternative basis for asylum, *i.e.*, their family ties. *Ibid.* The court of appeals then went on to decide that question on its own, holding that "the particular family at issue * * * fell within the scope of the statutory term 'particular social group' and that the '[aliens] were attacked and threatened because they belong to [that] particular social group." *Id.* at 184-185. This Court held that the Ninth Circuit had erred by not remanding that question to the agency, which "ha[d] not yet considered whether [the] family present[ed] the kind of 'kinship ties' that constitute a 'particular social group'" under the immigration laws. *Id.* at 186.

In both *Ventura* and *Thomas*, the Ninth Circuit erred by deciding a question that had not been previously addressed by the BIA. Here, by contrast, the court of appeals reviewed a decision that the BIA had actually made—that petitioner was ineligible for with-

holding of removal because of the persecutor bar. Moreover, the court of appeals here found that the BIA had correctly applied the proper legal standard in making that decision. Nothing in *Ventura* or *Thomas* required the court to nonetheless remand because one sentence in the BIA's order, when read in isolation, was "vague and unhelpful." Pet. App. 21a.

Nor does the court of appeals' analysis conflict with this Court's decision in *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009). See National Immigrant Justice Center Amicus Br. 4-10. In *Negusie*, the Court held that the BIA had incorrectly viewed *Fedorenko*'s interpretation of the persecutor bar provision in the Displaced Persons Act as "controlling" the BIA's interpretation of the INA's distinct persecutor bar provisions. 129 S. Ct. at 1162. *Fedorenko* had held that there was no "voluntariness requirement" in the Displaced Persons Act's persecutor bar, making it applicable to the concentration camp guard regardless whether his actions were voluntary or compelled. See *id.* at 1165 (citing *Fedorenko*, 449 U.S. at 512). The BIA in *Negusie* had concluded that this aspect of *Fedorenko* required it to reject an alien's claim that his actions had been compelled and were thus not covered by the INA's persecutor bars. *Id.* at 1163. Noting that *Fedorenko* involved a different statute, this Court held that the BIA erred in believing that *Fedorenko*'s rejection of a voluntariness requirement in the earlier statute compelled rejection of such a requirement in the INA. *Id.* at 1165. Instead, the Court held that the INA was ambiguous on this point, and concluded that the BIA should resolve the ambiguity in the first instance. *Id.* at 1164.

As the court of appeals explained in this case, nothing in "*Negusie*'s holding * * * prevent[s] all analog-

izing between *Fedorenko* and INA cases." Pet. App. 20a. "Given that *Negusie* analyzed *Fedorenko*'s application only in the context of allegedly involuntary actions," the court found that "*Fedorenko*'s analysis of what constitutes persecution remains instructive where voluntariness is not at issue." *Ibid.* Given that petitioner, unlike the alien in *Negusie*, made no claim that his actions were compelled or involuntary, the error identified by this Court in *Negusie* is not relevant to this case. *Ibid.* Indeed, petitioner conceded before the court of appeals that "*Negusie* 'does not impact this appeal' and 'is not inconsistent with application of *Fedorenko*.'" *Id.* at 20a n.9.

2. Petitioner contends that the "courts of appeals are sharply divided over whether the ordinary remand rule applies where the BIA has not yet employed the correct legal standard to resolve an issue within the agency's field of expertise." Pet. 21. He contends that in the decision below, the court of appeals joined those courts that hold that "the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22.

Even if there were a conflict in the circuits on this question, this case would not present a vehicle for its resolution because the court of appeals held that the BIA committed no error—legal or factual. Accordingly, the court was not required to determine what kind of error requires a remand. See pp. 9-16, *supra*.

In any event, petitioner's claim that there is a division in the circuits ignores the fact that "whether remand is necessary in a case is dependent on the facts and legal posture of that particular case." *Lin* v. *Mukasey*, 517 F.3d 685, 694 n.12 (4th Cir. 2008). It is largely these differences in circumstances, rather than

a disagreement over whether remand is required "only when additional fact-finding is necessary," Pet. 22, that led to the different outcomes discussed by petitioner.

For example, petitioner identifies the Fourth Circuit as subscribing to the view that "the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22. He discusses *Hussain* v. *Gonzales*, 477 F.3d 153 (2007), in which that court held that a remand was unnecessary "[b]ecause the result of a remand to the [BIA] is a foregone conclusion such that remand would amount to nothing more than a mere formality." *Id.* at 158; see Pet. 22-23. In a later case, however, the Fourth Circuit remanded a legal question to the BIA—"what constitutes 'other resistance to a coercive population control program.'" *Lin*, 517 F.3d at 694 n.12 (quoting 8 U.S.C. 1101(a)(42)(B)). In doing so, it said the remand requirement is broad in scope. See *ibid.* ("Given that the Supreme Court in *Ventura* and *Thomas* has stated in no uncertain terms that remand is *ordinarily required* when the BIA has not addressed an issue in the first instance, we tread on dangerous ground when we decide an issue that the BIA has not yet considered."). Likewise, the Sixth Circuit, which petitioner claims adopted the view in this case that a remand is required only following a finding of factual error, has remanded to the BIA to apply a (corrected) legal standard to the facts of a case. See *Amir* v. *Gonzales*, 467 F.3d 921, 927 (2006) (remanding to the BIA for application of proper legal standard to alien's claim for withholding of removal under the Convention Against Torture).

At the same time, courts that petitioner identifies as automatically remanding upon a finding of legal error, see Pet. 24-26, do not in reality follow such an unbending

rule. See, *e.g.*, *Retuta* v. *Holder*, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010) (remand under *Ventura* required when BIA did not reach "a fact-dependent matter of first impression," but not necessary when the BIA addressed a legal question "and its opinion is reversed").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ERIC H. HOLDER, JR.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REPLY BRIEF OF PETITIONER

The government's opposition neither denies the importance of the question presented nor credibly disputes the existence of an eleven-circuit split over the application of the "ordinary remand rule" set out in *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006). Its entire effort at avoiding certiorari (or summary reversal) is premised on an untenable characterization of the Sixth Circuit's analysis. Notwithstanding the government's creative reconstruction of the decision below, the Sixth Circuit plainly identified the error in the legal standard applied by the BIA. But instead of remanding to permit the agency to apply the correct standard to the facts in the first instance, the court transparently undertook its own *de novo* inquiry. In at least seven circuits, however, Parlak's case would have been remanded to the BIA for application of the correct legal standard. Certiorari is warranted.

1. The government concedes that the Sixth Circuit should have remanded the case if the BIA applied the "incorrect legal standard." Opp.9. Its assertion that certiorari is not warranted because "the court of appeals found that the BIA applied the correct legal standard," *id.*, does not withstand scrutiny.

First, as the Sixth Circuit stated, the BIA "articulated the test as whether an individual 'furthers persecution in some way.'" App.18a. "*To be sure*," the Sixth Circuit stated, that articulation of the test "was vague and unhelpful." App.21a (emphasis added). As the Sixth Circuit explained, "the issue is *not* whether the person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with

persecutors.'" *Id.* (citation omitted) (first emphasis added); App.51a (Martin, J., dissenting) ("[W]e all agree that the Board's inquiry was incorrect.").

The government does not dispute this. It stresses instead that the Sixth Circuit found the BIA's articulation of the governing law "'vague and unhelpful *on its own.*'" Opp.12 (quoting App.21a). *But that was the BIA's only articulation of the governing standard.* This Court has repeatedly made clear that an agency's decision must be judged solely on the grounds invoked by the agency: "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare.").

The governing law requires proof far beyond the BIA's fuzzy "'further[ing] persecution in some way'" standard. App.18a (citation omitted). Rather, the record must demonstrate an "*actual connection* between [petitioner's] actions and the persecution(s) in which []he is alleged to have assisted or otherwise participated." *Diaz-Zanatta v. Holder*, 558 F.3d 450, 459 (6th Cir. 2009) (emphasis added). The government's implicit argument that the BIA's standard was close enough is a nonstarter. As the petition (and the Sixth Circuit, for that matter) explained, the standards differ in kind and degree and will lead to disparate results in any number of cases—including this one. *See* Pet.18 (citing App.21a). The error here was no less legal error than a court

requiring only a possibility (rather than likelihood) of success on the merits for a preliminary injunction.

The government's fallback position is that regardless of the BIA's articulation of the law, the BIA actually "demanded evidence of genuine assistance." Opp.13. In other words, the government contends that if the BIA had understood the governing law, it still would have reached the same outcome. That is sheer guesswork. And as the Solicitor General has argued before, it is irrelevant too. Pet.20-21.

Second, the government finds solace in the Sixth Circuit's comment that "the BIA's analysis was consistent with *Fedorenko*." Pet.21a (citing *Fedorenko v. United States*, 449 U.S. 490 (1981)). But the government admits that *Fedorenko* merely "illuminate[s]" or "inform[s]" the actual governing standard to be applied. Opp.8, 9. Nearly thirty years ago, footnote 34 of *Fedorenko* suggested that whereas an individual who only cut inmates' hair prior to execution "cannot be found to have assisted in the persecution of civilians," a paid guard who shot at escaping inmates "fits within the statutory language." *Fedorenko*, 449 U.S. at 512 n.34. This Court observed that "[o]ther cases may present more difficult line-drawing problems but we need decide only this case." *Id.* And in the decades since *Fedorenko*, a more precise and searching test with "two distinct requirements ha[s] emerged." *Diaz-Zanatta*, 558 F.3d at 455; *see also* Pet.10 (collecting cases). First, "there must have been some nexus between the alien's actions and the persecution of others." *Diaz-Zanatta*, 558 F.3d at 455. "[S]econd, if such a nexus is shown, the alien must have acted with scienter ...." *Id.* This is not the test the BIA applied.

Despite intimations to the contrary, moreover, the government cannot seriously contend that amorphous "consistency" with the general aims of *Fedorenko*'s footnote 34 is sufficient. The government elsewhere has argued that scienter "is *not* required" under *Fedorenko*, *see Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20-21 (1st Cir. 2007) (emphasis added), even though it clearly is under the governing standard here.[1] And the Sixth Circuit has previously condemned "the [agency]'s rote reliance on *Fedorenko*," and failure to apply the two-pronged test. *Diaz-Zanatta*, 558 F.3d at 459-60.[2] Here, the BIA neither invoked *Fedorenko* nor applied the two-pronged test.

2. The government asserts that the Sixth Circuit did "not engage[] in its own 'independent analysis' of the record," Opp.12 (quoting Pet.22), and "merely affirm[ed] findings expressly made by the BIA," *id.*

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[1] Contrary to the government's assertion, Parlak did not "agree[] that the *Fedorenko* standard governed," Opp.8 (citing App.20a n.9), nor did the Sixth Circuit ever so state. The court merely noted that the parties had described this Court's decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), as "'not inconsistent with the application of *Fedorenko*.'" App.20a n.9 (citation omitted). Moreover, the Sixth Circuit expressly stated that "'the question of whether [Parlak] participated in persecution can be decided based on *existing circuit precedent*,'" App.20a (emphasis added) (citation omitted) (alteration in original), as distinct from this Court's decision in *Fedorenko*.

[2] The government also argues that because in a footnote in *Diaz-Zanatta* the Sixth Circuit cited *In re A-H-*, 23 I. & N. Dec. 774, 784 (A.G. 2005), the BIA's citation here to *In re A-H-* somehow indicates that the agency applied the proper persecutor bar standard in this case. Opp.12. But the BIA's sole use of *In re A-H-* was not to set out any nexus or knowledge tests, but merely to support the limited proposition that the persecutor bar does not require direct involvement in persecution. App.70a-71a.

(citing App.17a). But the Sixth Circuit's analysis under *Diaz-Zanatta* contains not one reference to the BIA's opinion. *See* App.21a-22a. And the Sixth Circuit's own language refutes the government's suggestion. After articulating the correct standard and conducting its own analysis, the court held: "*we find* that a nexus exists ... and that Parlak acted knowingly." App.22a (emphasis added).[3]

The government has no response. Instead, it persistently misattributes to the BIA findings and analysis conducted in the first instance by the Sixth Circuit. The government asserts, for example, that, "*As the court noted, the BIA found* that petitioner had provided money and weapons ... and had done so 'voluntarily and knowingly.'" Opp.8 (emphasis added) (quoting App.21a-22a). But the passage from which the government quotes is the Sixth Circuit's own findings and makes no reference to any findings of, or analysis by, the BIA. *See* App.22a. Similarly, the term "nexus" does not appear, either expressly or in concept, in the BIA's opinion, and appears in the Sixth Circuit's decision only in the court's own application of *Diaz-Zanatta*. App.21a-22a. Nevertheless, the government asserts that, "[a]s the court of appeals explained, the BIA in this case applied that 'nexus' standard." Opp.11 (citing App.21a).

Not only does the government misattribute to the BIA findings made by the Sixth Circuit, but it also

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[3] The government also stresses the Sixth Circuit's statement that "the BIA did not err in its legal analysis." App.23a. But that statement came only *after* the Sixth Circuit made its own findings and conclusions and is nothing more than the court's judgment that the agency reached what the court believed to be the correct legal *outcome*.

asserts facts that *neither* found when it claims that the agency and the court "found that petitioner had provided money and weapons to the PKK."[4] Opp.8 (citing App.21a-22a). Neither the Sixth Circuit nor the BIA concluded that any proceeds from the folk-dancing festivals Parlak helped organize ever made it from ERNK to the PKK. *See* App.32a-33a. Although the government conflates ERNK with the PKK, the Sixth Circuit recognized these organizations as distinct, *see* App.4a, 16a—hence the court's novel reliance on *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), to bridge the substantial logical gap between the folk festivals in Germany and unspecified persecutory activities by the PKK in Turkey.[5] *See* Pet.18-20; National Immigrant Justice Center Amicus Br. at 10-12.

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[4] Though not relevant to the question presented, the brief in opposition also repeatedly mischaracterizes the facts about Parlak. As the district court noted in granting the habeas writ, Parlak is a "model immigrant" who "is not a threat to anyone." *Parlak v. Baker*, 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005), *vacated as moot sub nom. Parlak v. U.S. Immigration & Customs Enforcement*, No. 05-2003, 2006 U.S. App. LEXIS 32285 (6th Cir. Apr. 27, 2006). And as Judge Martin noted in dissent from the Sixth Circuit's decision, "there is no evidence in the record that Parlak did anything 'to aid the PKK in committing violent acts.'" App.34a.

Nevertheless, the government represents that the BIA concluded Parlak "was in fact 'a fighter for the armed wing of the PKK.'" Opp.6 (quoting App.70a). That is false. A government witness—an agent who gave mere "profil[ing]" testimony and who had no direct knowledge of any of the facts—testified as much. App.17. But the BIA neither endorsed nor adopted that testimony as a fact. App.70a.

[5] As Judge Martin noted in dissent, the principle borrowed from *Humanitarian Law Project*—"[M]oney is fungible; giving support intended to aid an organization's peaceful activities frees

3. The government barely engages on the circuit split, largely relying on its claim that this case is not a proper vehicle to resolve any conflict. Opp.16. Beyond that, it cites three inapposite cases, none of which support its suggestion that the split is less than fully entrenched.

First, the government claims that the disparate outcomes between the circuits result from differences in facts and circumstances, rather than the circuits' adoption of conflicting interpretations of *Ventura* and *Thomas*. Opp.16-17. But it fails to refute *any* of the cases cited in the petition. In *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007), for example, the court (along with a minority of circuits) held that *Ventura* and *Thomas* concern only "the appellate court's authority to review in the first instance *factual* issues not considered by the Board." *Id.* at 157. The dissent disagreed, echoing the view of seven circuits that *Ventura* and *Thomas* "involved factual and legal aspects" and required "not only ... the Board's review of evidence in the record, but ... the Board's application of the law to the facts. Such application of the law to the facts brings into play the Board's conferred

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up resources that can be used for terrorist acts," 205 F.3d at 1136, *cited in* App.22a—"is a far cry from requiring a causal connection with 'actual persecution' and knowledge or intent of such persecution, as the persecutor bar does." App.33a n.3.

Nor did the Sixth Circuit or the BIA conclude that any of the buried weapons ever reached the PKK. Indeed, as Judge Martin points out, "there is no evidence that the weapons [Parlak] supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a.

interpretative expertise in the field of immigration law." *Id.* at 160-61 (citations omitted).[6]

The government likewise has no response to the fact that the Second, Seventh, and Ninth Circuits previously limited application of the ordinary remand rule to cases where the agency had not considered factual issues, but now hold that "where the BIA applies the wrong legal standard to an applicant's claim, the appropriate relief ... is remand for reconsideration under the correct standard, not independent review of the evidence." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006); *Matadin v. Mukasey*, 546 F.3d 85, 92 (2d Cir. 2008) (changing course and holding that it "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt" nor itself "engage in fact-finding under the appropriate legal standard") (internal

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[6] The government suggests that when the Fourth Circuit in *Li Fang Lin* remanded to the BIA the question of "what constitutes 'other resistance to a coercive population control program,'" *Li Fang Lin v. Mukasey*, 517 F.3d 685, 694 n.12 (4th Cir. 2008) (quoting 8 U.S.C. § 1101(a)(42)(B)), it backed away from the narrow interpretation of the ordinary remand rule it set out in *Hussain*. Opp.17. In fact, the court distinguished *Hussain* on the basis that the BIA's error in *Li Fang Lin* necessitated remand as to *factual* circumstances that "the BIA ha[d] not yet considered." 517 F.3d at 694 n.12; *id.* ("[W]e do not know what happened during Lin's IUD insertion because Lin was not allowed to testify about the IUD insertion procedure."). The Fourth Circuit's remand of that issue in *Li Fang Lin* is thus entirely consistent with its position in *Hussain*.

Likewise, the government's citation (at Opp.18) to *Retuta v. Holder*, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010), does not undermine the conflict. There, the court declined to remand for resolution of a pure question of law that did not require application of the correct standard to the facts. *Id.*

quotation marks and citation omitted); *see also* Pet.26 (citing *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008)). Parlak's case plainly would have been remanded for reconsideration in these circuits, and the government does not disagree.

Indeed, the government's citation (at Opp.17) to *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006), illustrates precisely why certiorari is warranted. The Sixth Circuit has now shifted in the opposite direction from the Second, Seventh, and Ninth Circuits. *See also* App.52a (Martin, J., dissenting) ("[B]efore this case, it was the settled practice of [the Sixth Circuit] to remand when the Board or Immigration Judge apply the incorrect law."). Eleven circuits have spoken on the issue and are divided seven to four. In recent years, four circuits (moving in different directions) have changed sides of the conflict. The circuits are not moving towards reconciliation, and there is no reason to defer review.

4. Finally, the government does not dispute that no rare circumstances would justify an exception to the ordinary remand rule in this case. It also effectively concedes that summary reversal would be proper if the BIA applied the wrong legal standard.

CONCLUSION

The petition for certiorari should be granted and set for argument, or the decision summarily reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

IBRAHIM PARLAK,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Immigrant Justice Center ("NIJC") is a nationally recognized non-governmental organization dedicated to ensuring human-rights protections and access to justice for all immigrants, refugees, and asylum seekers.[1] By partnering with more than 1,000 pro bono attorneys, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's policy, litigation, and educational initiatives, as it promotes human-rights on a local, regional, national, and international level. NIJC has a substantial interest in the issue before the Court, both as an advocate for the rights of refugees and asylum seekers generally and as the leader of a network of attorneys who regularly represent refugees and asylum seekers in legal proceedings.

SUMMARY OF ARGUMENT

The Board of Immigration Appeals ("BIA") found that Petitioner was ineligible for asylum based on the BIA's interpretation of the persecutor bar, which states that an alien who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for withholding from removal on

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[1] Counsel of record for all parties received timely notice of the NIJC's intention to file this brief and consented to its filing. No party, counsel for a party, or person other than the NIJC, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

asylum grounds. Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.* ("INA"), 8 U.S.C. § 1101(a)(42)(B); 8 U.S.C. § 1158(b)(2)(A); 8 U.S.C. § 1231(b)(3)(B)(i). Relying on previous BIA decisions that interpreted the persecutor bar under the INA as controlled by this Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981),[2] the BIA interpreted "assisted ... in the persecution" as extending to any person who "furthers the persecution [of others] *in some way*." Pet. App. at 70a (emphasis added).

The Sixth Circuit disagreed with this interpretation, finding it "vague and unhelpful," and noted that "the issue is not whether the person

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[2] In *Fedorenko*, this Court considered whether a U.S. citizen who had served as a Nazi concentration camp guard, albeit allegedly as a prisoner of war, but who did not disclose that fact in his visa application under the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (the "DPA"), could have his citizenship revoked under the INA, 8 U.S.C. § 1451(a) (requiring revocation of citizenship "illegally procured or ... procured by a concealment of a material fact or by willful misrepresentation"). 449 U.S. at 493. The Court held that Fedorenko's failure to disclose his service as a Nazi concentration camp guard was a misrepresentation of a material fact because the DPA did not contain a "voluntariness" exception to its persecutor bar, *id.* at 512, and because the evidence left "no room for doubt" that Fedorenko "would have been found ineligible for a visa" under the DPA had he disclosed that he had served in that capacity. *Id.* at 513. The Court noted, however, that under different facts, there might be more "difficult line-drawing problems" as to whether a person's conduct constituted "persecution" under the DPA. *Id.* at 513 n.34.

assists in *some* way." Pet. App. 21a. Rather than reversing and remanding, however, the Sixth Circuit took it upon itself to apply its own construction of the persecutor-bar "assistance" language to the underlying record. As Petitioner argues, this was error under *INS v. Orlando Ventura*, 537 U.S. 12 (2002), and *Gonzalez v. Thomas*, 547 U.S. 183 (2006).

The Court should grant the petition for a writ of certiorari and summarily reverse the Sixth Circuit decision for two additional reasons:

First, summary reversal is warranted because the Sixth Circuit should have remanded the case to the BIA pursuant to *Negusie v. Holder*, 129 S. Ct. 1159 (2009). In *Negusie*, this Court rejected a construction of the persecutor bar standard relied upon by the BIA as based upon a "mistaken legal premise." *Id.* at 1163. The BIA in this case relied upon the same flawed standard rejected in *Negusie*. Further, just as in *Negusie*, the BIA here has not had the opportunity, in the first instance, to apply an appropriate interpretation of the persecutor bar to the facts of Petitioner's case.

Second, the Sixth Circuit for the first time applied to the asylum context a wholly inapplicable doctrine drawn from the prohibition of material support for designated terrorist groups under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Under the Sixth Circuit's "money is fungible" test, any amount of monetary assistance provided by an asylum applicant that could be channeled to a group that persecutes others could meet the persecutor bar "assistance" standard. Leaving aside the

questionable wisdom of applying such a broad doctrine to the asylum context, such a policy decision is, at least in the first instance, within the province of the Executive Branch, not the courts.

ARGUMENT

I. Summary Reversal Is Warranted Because The Sixth Circuit Should Have Remanded The Case To The BIA After The BIA Applied An Interpretation Of The Persecutor Bar Rejected By This Court In *Negusie*.

"The statute that bars persecutors has a smooth surface beneath which lies a series of rocks. Among the problems are the nature of the acts and motivations that comprise persecution, the role of scienter, whether and when inaction may suffice, and the kind of connection with persecution by others that constitutes 'assistance.'" *Castaneda-Castillo v. Gonzalez*, 488 F.3d 17, 20 (1st Cir. 2007) (*en banc*).

This Court should summarily reverse the Sixth Circuit for failing to remand Petitioner's case to the BIA in light of this Court's decision in *Negusie*. *See Parlak*, 578 F.3d at 469, Pet. App. at 20a. The error here is virtually the same as in *Negusie*: the BIA erroneously applied *Fedorenko*'s "objective effects" test to the statutory phrase "assisted ... in the persecution" of others, and thus ignored the complexities of the persecutor bar, such as Petitioner's motivation, intent and *scienter*.

In *Negusie*, this Court held that the BIA's interpretation of the persecutor bar standard was flawed because the BIA had "misapplied our precedent in *Fedorenko* as mandating that an alien's

motivation and intent are irrelevant to the issue whether an alien assisted in persecution." 129 S. Ct. at 1163. The Court remanded to the BIA so that the BIA could "confront the same question free of this mistaken legal premise."[3] *Id.*

Here, the BIA stated, without analysis, that "[a] person assists in the persecution of others when he furthers the persecution in some way."[4] Pet. App. at 70a. As support, the BIA relied on *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), *abrogated by Negusie v. Holder*, 129 S. Ct. 1159 (2009). Pet. App. at 70a. In *Rodriguez-Majano*, the BIA interpreted the persecutor bar as concerning only the "objective effect" of an alien's conduct without regard to questions of volition, motivation or intent.[5] This is

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[3] The Sixth Circuit attempted to distinguish *Negusie* on the ground that "voluntariness [was] not at issue" in Petitioner's case. *See, e.g., Parlak*, 578 F.3d at 469, Pet. App. at 20a. In *Negusie*, however, voluntariness was merely one aspect of the broader mistaken premise relied upon by the BIA that, pursuant to *Fedorenko*, the persecutor bar required only a showing of an "objective effect" without regard to questions of volition, motivation or intent. 129 S. Ct. at 1163.

[4] The Sixth Circuit found the BIA's broad interpretation "vague and unhelpful" because "the issue is not whether a person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with persecutors.'" *Parlak*, 578 F.3d at 470, Pet. App. at 21a (citing *Singh v. Gonzalez*, 417 F.3d 736, 739 (7th Cir. 2005)). However, the Sixth Circuit nevertheless affirmed the BIA's decision and stated that "the BIA did not err in its legal analysis." *Parlak*, 578 F.3d at 470, Pet. App. at 23a.

[5] The BIA stated:

the same "objective effect" standard that this Court later rejected in *Negusie* because it was based on the "mistaken legal premise" that *Fedorenko* controlled in this context. *Negusie*, 129 S. Ct. at 1163.[6]

> The participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. *See Fedorenko v. United States*, 449 U.S. 490 (1981). However, mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only if one's action or inaction furthers that persecution in some way. It is the objective effect of an alien's actions which is controlling. *Laipenieks v. INS*, 750 F. 2d 1427, 1435 (9th Cir. 1985); *Matter of Fedorenko*, Interim Decision 2963, at 17 (BIA 1984); *see Fedorenko v. United States*, *supra*, at 750 n.34.

Rodriguez-Majano, 19 I. & N. Dec at 814-15.

[6] The Immigration Judge in this case also relied upon *Rodriguez-Majano*'s "objective effect" standard:

> A person assists in the persecution of others when his or her action or inaction furthers the persecution in some way. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988). It is the objective effect of an alien's actions which is controlling. *Id.*, citing *Laipenieks v. INS*, 750 F.2d 1427, 1435 (9th Cir. 1985); *Matter of Fedorenko*, 19 I&N Dec. 57, 69 (BIA 1984), *see also Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981). Participation or assistance need not be on the alien's own volition *Matter of Rodriguez-Majano*, *supra* at 814, citing *Fedorenko v. United States*, *supra*. Personal involvement in the persecution is not necessary to impose responsibility for assisting or participating in persecution.

Pet. App. at 119a. The BIA upheld this analysis. Pet. App. at 72a-73a.

Moreover, in *Negusie*, this Court specifically criticized *Rodriguez-Majano* as "incorporat[ing] without additional analysis the *Fedorenko* rule" from previous decisions that were similarly flawed. 129 S. Ct. at 1167.

The BIA in this case applied the "objective effects" standard without making specific findings as to motivation, intent or *scienter*. The BIA merely concluded that Petitioner's conduct "amount[ed] to knowing assistance in fund-raising," Pet. App. at 72a, because he raised money for an organization known as the ERNK. Pet. App. at 60a. The Sixth Circuit found this to mean that Petitioner "voluntarily and knowingly provided money, which he knew could be used by the PKK for anything." *Parlak*, 578 F.3d at 470, Pet. App. at 22a. However, Petitioner testified that at the time he engaged in such fund-raising, "he had no knowledge that the PKK engaged in terrorist activity." Pet. App. at 94a. Indeed, the PKK was not designated as a "Foreign Terrorist Organization" under the INA until October 8, 1997, Pet. App. at 93a-94a (referring to 8 U.S.C. § 1189), which was six years after Petitioner had arrived in the United States, Pet. at 19.

The BIA made no findings as to whether Petitioner, at the time he was organizing Kurdish cultural festivals for the ERNK in Germany, knew about the persecutive activities of the PKK in Turkey, or how his fund-raising activities might be linked to specific persecutive activities of the PKK. Courts have held that one cannot "assist" in persecution under the persecutor bar if one does not know, at or before the time the assistance is

rendered, that persecution is occurring or will likely occur as a result of one's assistance. *See Diaz-Zanatta v. Holder*, 558 F.3d 450, 458 (6th Cir. 2009) (remanding where Immigration Judge "did not consider . . . whether Diaz-Zanatta had prior or contemporaneous knowledge of any such persecutions."); *Castaneda-Castillo*, 488 F.3d at 20 ("[A] bus driver who unwittingly ferries a killer to the site of a massacre can hardly be labeled a 'persecutor,' even if the objective effect of his actions was to aid the killer's secret plan."); *cf. Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring) (describing the "unknowing persecutor" problem under the "objective effects" standard, where the persecutor bar could "encompass even an alien who had no idea that his actions would 'objectively' assist in persecution"). Nor did the BIA determine that Petitioner's fund-raising activities were performed with any degree of motivation or specific intent to further the PKK's persecutory acts.

The failure of the Sixth Circuit to require that the BIA analyze issues of motivation, intent and *scienter* also stands in stark contrast to the weight of appellate court authority, which suggests that an inquiry into personal culpability is necessary for an application of the persecutor bar.[7] For example, in

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[7] Determining that an individual acted "'knowingly' does not necessarily have any reference to a culpable state of mind." *Bryan v. United States*, 524 U.S. 184, 192 (1998); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) (noting a distinction between acting with knowledge of the action's likely effects and acting "with the 'conscious object' of producing such effect.")

Castaneda-Castillo, the *en banc* First Circuit considered the case of a former lieutenant in the Peruvian military who was part of an operation to hunt for members of the Shining Path in a village. 488 F.3d at 19. While Castaneda's patrol stood guard outside the village to block escape routes, another patrol engaged in a brutal massacre of dozens of innocent civilians. *Id.* Castaneda claimed not to have known about the massacre at the time. *Id.* The Immigration Judge found that regardless of Castaneda's state of mind, the "objective effect" of Castaneda's participation was to block the escape of the villagers being massacred. *Id.* at 20. The First Circuit reversed and remanded, finding that there was insufficient evidence to apply the persecutor bar to Castaneda. *Id.* The court noted that "the term 'persecution' strongly implies both scienter and illicit motivation," and that the "objective effect" test was insufficient insofar as it did not distinguish between "degree[s] of moral culpability." *Id.* at 20-22; *see also Hernandez v. Reno*, 258 F.3d 806, 813-14 (8th Cir. 2001) (vacating BIA application of the persecutor bar and remanding where the BIA failed adequately to consider the degree of personal culpability); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) ("[I]ndividual accountability must be established."); *cf. Xu Sheng Gao v. U.S. Attorney General*, 500 F.3d 93, 99 (2d Cir. 2007) (noting that persecutor bar should require more than conduct "tangential" and "passive in nature" with regard to oppressive acts).

The Sixth Circuit erred in failing to remand this case to the BIA following *Negusie* because the BIA

had not determined in the first instance whether *any* degree of moral culpability was required under the persecutor bar. The "in some way" test that the BIA relied on was developed on the basis of a mistaken application of *Fedorenko* and a flawed assumption that the inquiry under the statute is limited to the objective effects of an asylum applicant's actions.

Summary reversal is warranted here because, as in *Negusie*, the agency decision was flawed by a mistaken legal premise. The Sixth Circuit should have remanded the case to the BIA so that the agency could in the first instance consider issues of motivation, intent, and *scienter* divorced from the "objective effects" standard that this Court has already rejected.

II. Summary Reversal Is Warranted Because The Sixth Circuit Impermissibly Established A New And Radical Immigration Policy By Extending The "Fungibility of Money" Doctrine To The Standard For Withholding Of Removal.

This case also illustrates why federal courts should follow the "ordinary remand rule" instead of making immigration policy in the first instance, and why summary reversal of the Sixth Circuit's decision is both warranted and necessary. *See Ventura*, 537 U.S. at 16-17 (noting that the ordinary remand rule has "obvious importance in the immigration context.")

After rejecting the BIA's interpretation of the persecutor bar, the Sixth Circuit held that the BIA should have applied the test the Sixth Circuit had recently adopted in *Diaz-Zanatta*, an opinion

published after the BIA's decision. *Parlak*, 578 F.3d at 470, Pet. App. at 20a. *Diaz-Zanatta* held that there were "two distinct requirements" to the analysis of whether a person's conduct met the standard of "assistance" under the persecution bar: (1) whether there was "some nexus between the alien's actions and the persecution of others," and (2) "if such a nexus is shown, [whether] the alien ... acted with scienter." *Diaz-Zanatta*, 558 F.3d at 455. However, instead of remanding to the BIA, the Sixth Circuit improperly conducted a *de novo* review in an attempt to resuscitate the BIA's findings made under a flawed legal standard. *See Ventura*, 537 U.S. at 16 ("A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'") (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

To overcome the clear inadequacy of the record, the Sixth Circuit took the impermissible step of establishing immigration policy by importing a doctrine, "money is fungible," from a Ninth Circuit opinion construing the prohibition on material support for designated terrorist organizations under the AEDPA. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000). Under that test, which has never been cited in any BIA rulemaking or decision in relation to the persecutor bar, "giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts." *Id.*

There are many reasons to question whether this is a sound or even permissible construction of the

persecutor bar in the asylum context. For example, if certain environmental advocacy campaigns are to be believed, any foreign owner of a gas-guzzling SUV might be disqualified from seeking asylum since the money spent on gasoline could theoretically end up supporting terrorist groups.[8]

This Court's decision in *Bridges v. Wixon*, 326 U.S. 135 (1945), is also instructive. The case involved whether a leading union organizer, Harry Bridges, could be deported under a statute that allowed the exclusion of aliens who "affiliated" with groups advocating the violent overthrow of the United States government, such as the Communist

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[8] *See* Americans for Fuel Efficient Cars, *The Detroit Project*, *available at* http://www detroitproject.com/ads/default.htm (last visited Mar. 24, 2010) A script for an ad called "George" reads:

> This is George. This is the gas that George bought for his SUV. This is the oil company executive that sold the gas that George bought for his SUV. These are the countries where the executive bought the oil that made the gas that George bought for his SUV. And these are the terrorists who get money from those countries every time George fills up his SUV.
>
> OIL MONEY SUPPORTS SOME TERRIBLE THINGS. WHAT KIND OF MIL[E]AGE DOES YOUR SUV GET?
>
> www.thedetroitproject.com
>
> Paid for by The Detroit Project

Party. *Id.* at 139-40. This Court reversed the deportation order, finding that Bridges had not "affiliated" with the Communist Party, despite his advocacy activities and position as a union leader. *Id.* at 147-49. This Court held:

> Common sense indicates that the term "affiliation" in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months, even though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become "affiliated" with the Communist cause because those men are Communists.

Id. at 143. Although the context is obviously different, the Court's discussion of overly broad definitions of "affiliations" and the Court's example of individuals who provide food to hungry men illustrate the peril of exporting a "money is fungible" concept to asylum decisions. Absent a specific finding of congressional intent, it should not be presumed that any individual who donates money to or raises money for an organization necessarily intends to support acts of persecution those organizations may engage in, let alone the activities

of merely affiliated organizations. A "money is fungible" rule could obliterate all such distinctions.

There is no reason to believe that Congress intended the persecutor bar to cast such a wide net in the asylum context. As noted by the Second Circuit:

> In evaluating a persecutor bar claim, it must be remembered that this provision authorizes the deportation of individuals who have established that they would likely be persecuted if sent back to their native country. Thus, courts must be cautious before permitting generalities or attenuated links to constitute "assistance."

Xu Sheng Gao, 500 F.3d at 98. For this reason, "where the fate of a human being is at stake the presence of [an] evil purpose may not be left to conjecture" and it is impermissible to "impute belief" based on "[i]nference ... piled on inference." *Bridges*, 326 U.S. at 148, 149.

Here, as in *Negusie*, the Sixth Circuit improperly applied a test derived from "a different statute enacted for a different purpose." *See* 129 S. Ct. at 1166. Such a fundamental policy decision is, at least in the first instance, within the exclusive province of the Executive Branch, not the courts. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). It

does not matter whether the Sixth Circuit's analysis is, in fact, the correct analysis: "For [the] purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.*

The Sixth Circuit's attempt to rewrite basic principles of asylum law illustrates why the "ordinary remand rule" is the accepted and usual course of judicial proceedings in the context of judicial review of administrative agency decisions. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Negusie*, 129 S. Ct. at 1164. Summary reversal is warranted because the Sixth Circuit so far overstepped its bounds.

CONCLUSION

For the foregoing reasons, the NIJC requests that this Court grant the Petitioner's petition for a writ of certiorari and summarily reverse the decision below.

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